103

MARINE MAMMAL PROTECTION ACT REAUTHORIZATION

Y 4.M 53:103-15

Marine Mammal Protection Act Reauth...

HEARING

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENT
AND NATURAL RESOURCES

OF THE

COMMITTEE ON
MERCHANT MARINE AND FISHERIES
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

GOVERNING INTERACTIONS BETWEEN MARINE MAMMALS AND COMMERCIAL FISHING OPERATIONS

APRIL 20, 1993

Serial No. 103-15

Printed for the use of the Committee on Merchant Marine and Fisheries

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MARINE MAMMAL PROTECTION ACT REAUTHORIZATION

TUESDAY, APRIL 20, 1993

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES, COMMITTEE ON MERCHANT MARINE AND FISHERIES,

Washington, DC.

The subcommittee met, pursuant to call, at 10:04 a.m., in room 1334, Longworth House Office Building, Hon. Gerry E. Studds [chairman of the subcommittee] presiding.

Present: Representatives Studds, Hochbrueckner, Pallone, Furse, Hamburg, Eshoo, Saxton, Young, Gilchrest, Castle.

Staff Present: Jeffrey Pike, Sue Waldron, Karen Steuer, Lesli Gray, Leigh Ann Clayton, Tod Preston, Will Stelle, Cyndy Wilkinson, Laurel Bryant, Jill Brady, Tom Melius, Margherita Woods, Janeanne Rex, Rod Moore, Julie Roberts, Eunice Groark.

OPENING STATEMENT OF HON. GERRY E. STUDDS, A U.S. REPRESENTATIVE FROM MASSACHUSETTS, AND CHAIRMAN, SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES

Mr. STUDDS. The subcommittee will come to order. No group of animals has captured the imagination of the American people in the same way as marine mammals have. During the late '60's and into the '70's, whales literally became the symbol of the environmental movement—the umbrella under which thousands gathered to push for the protection of fragile marine ecosystems and precious coastal environments. The Japanese and the Russians became our enemies in a new antiwhaling war, and we cheered on ecowarriers in little rubber boats who risked their lives by placing themselves between harpoons and whales.

It is little wonder then that this climate also included the passage of the Marine Mammal Protection Act. Initially generated by the public outcry over the deaths of thousands of dolphins in the tuna purse seine nets of the tropical Pacific, the Act went on to become one of the strongest conservation laws ever passed by this or any other nation.

From the beginning, however, minimizing incidental takes of marine mammals in commercial fisheries has been one of our greatest challenges. Seals, sea lions, whales, and dolphins are drawn to the sea's bounty for the same reasons we are. They make their living from herring and crab just as some of us do. We compete with them not only for food resources but for space.

From Massachusetts to Alaska and California to Florida, fishing vessels and marine mammals are frequently in the same place at the same time for much the same reasons. Given the circumstances, we have managed to share the oceans with remarkably few disastrous consequences. That we have been able to do it at all is largely due to the Marine Mammal Protection Act.

On the other hand, the history of the Act has been in some ways a roller-coaster ride. In 1988, following the now-famous Kokechik decision, we faced a crisis. We needed to find a way to keep our domestic fishing industry in business while still maintaining the goals of the Act. To the uninitiated, the Court's decision may have been back-page news, but for the National Marine Fisheries Service, it meant administrative chaos, and for many fishermen it spelled potential financial ruin.

The 1988 amendments to the Act were enacted as a result of that decision. Many of you sitting in this room today were sitting in this room then. This committee's response to the Kokechik decision was to give our fishing industry a five-year exemption from the take prohibitions of the Act and to give NMFS a mandate to collect better data on incidental take interactions and marine mammal populations during the same period.

It is fair to say, I think, that we haven't come as far as we would have liked during the past five years. We still don't know all we need to know about levels of incidental take or the status of some marine mammal species, and we certainly have a long way to go in terms of gear modification and incidental take mitigation. But we have made progress, and we have a proposal before us today that hopefully addresses some of the unknowns.

I am encouraged by the fact that representatives from the fishing industry and the environmental community have been meeting to discuss their similarities and their differences in response to this difficult issue. We all have our backs to the wall on the reauthorization. The September 30 deadline on the existing exemption program will be very quickly upon us, and we have work to do.

Mr. STUDDS. Does the gentleman from Delaware have a statement?

Mr. CASTLE. Thank you, Mr. Chairman. I do have statements by the Honorable Jack Fields and the Honorable James Saxton which I would like to submit for the record since they could not be here at the beginning of the session if I could, and I really do not have a statement except to say that, obviously, there has been tremendous conflict over the years between the fishing industry and those who protect marine mammals. And it is a very difficult subject to make proper findings in. It takes almost a Solomon-like mind to be able to resolve these things, and I think for that reason the testimony of the witnesses here today and those interested in the subject are of vital importance to all of us. I look forward to hearing all that I can today. Thank you.

STATEMENT OF HON. JACK FIELDS, A U.S. REPRESENTATIVE FROM TEXAS, AND RANKING MINORITY MEMBER, COMMITTEE ON MERCHANT MARINE AND FISHERIES

Mr. Chairman, I am pleased that the Committee is starting the process for the reauthorization of the Marine Mammal Protection Act (MMPA).

Although we do not have a bill before us today, I look forward to hearing the Administration's position on the National Marine Fisheries Service (NMFS) proposal for a program to govern the interaction between marine mammals and domestic commercial fishing operations. Due to a lawsuit which effectively negated NMFS' ability to issue incidental take permits in certain cases, Congress amended the MMPA in 1988. It is the provisions of that amendment that we are here to discuss.

I understand the complications within the fishing industry regarding the accidental take of marine species other than those targeted by the fishery. Sometimes it is extremely difficult to eliminate or even reduce that incidental take. Fortunately, not a single fishery in the Gulf of Mexico is in the Category I list, however, there are small amounts of cetaceans which are taken incidental to fishing operation in the Gulf.

While I would like to see marine mammals protected, I do not want to see all commercial fishery operations come to a halt. It is, therefore, essential that our fisheries be managed so that fishing can continue with little, if any, disruption. The 1988 amendments established a five-year interim exemption fro commercial fishing operations during which time NMFS was to establish a program to regulate this interaction. However, the exemption expires on October 1, and it is very important that Congress do something by that deadline, so those fisheries are not shut down, while we decide the best management program.

Thank you, Mr. Chairman.

STATEMENT OF HON. JAMES SAXTON, A U.S. REPRESENTATIVE FROM NEW JERSEY, AND RANKING MINORITY MEMBER, SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES

The Marine Mammal Protection Act will be one of the most difficult reauthorizations to be taken up in this 103d Congress. Today we will begin what I hope will prove to be a productive and fair process for managing the interactions between commercial fisheries and various species of marine mammals.

The goal of zero mortality, as articulated in the MMPA, is a noble one. However, the immediate attainment of this goal could only be realized through a closure of our domestic fisheries. Clearly, this is not an option.

The American public, for many reasons—most notably health— has a high demand for these public resources. More importantly, however, is the issue of foreign fishing. If the U.S. Fisheries were simply to shut down, this would do little to conserve, sustain and protect marine mammals. We have no authority over foreign fishing fleets beyond our EEZ, and the American consumer would continue to demand seafood caught by foreign interests who have little or no regard for the sustained populations of these creatures.

In addition, closing down domestic fisheries for the attainment of zero mortality will not address the impacts of coastal pollution and habitat destruction, which are increasingly being recognized as major threats to marine mammal populations around the world.

In all, the MMPA, if realistically amended and implemented with enforceability—can put our fleet to the fire for developing less harmful methods of harvesting the sea, while allowing us to continue to gain a better understanding of these creatures and the role they play in the marine ecosystem.

I am curious about a number of items contained in the proposed regime, and am anxious to hear the reactions and concerns from the various interest groups represented here today.

I welcome the witnesses to the Committee and look forward to hearing their testimony.

Thank you, Mr. Chairman.

Mr. STUDDS. I thank the gentleman. And I would like to request the Clerk to correct the record to indicate that I pronounced Kokechik correctly the first time. We will go to our first panel, Ms. Diana Josephson, Acting Undersecretary for Oceans and Atmosphere of NOAA, and Dr. Robert Hofman from the Marine Mammal Commission. We will have you appear together as you have already discerned, and we are going to ask you to confine your oral remarks to five minutes. I apologize for the barbaric nature of the lights in front of you. I think you have been subjected to them before. It is the only way of getting through the day around here.

When it turns yellow, you have a minute left, and when it turns red, you are done. Ms. Josephson, nice to hear from you.

STATEMENT OF DIANA JOSEPHSON, ACTING UNDERSECRETARY FOR OCEANS AND ATMOSPHERE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; ACCOMPANIED BY NANCY FOSTER, ACTING ASSISTANT ADMINISTRATOR FOR FISHERIES, NATIONAL MARINE FISHERIES SERVICE

STATEMENT OF DIANA JOSEPHSON

Ms. JOSEPHSON. Thank you. Mr. Chairman, members of the subcommittee, I am Diana Josephson, Deputy Undersecretary for Oceans and Atmosphere of the U.S. Department of Commerce and also Acting Undersecretary. I am accompanied by Dr. Nancy Foster, Acting Assistant Administrator for Fisheries of the National Marine Fisheries Service. I appreciate this opportunity to present the Department's views regarding the Marine Mammal Protection Act (MMPA) and how best to manage interactions between the marine mammals and commercial fisheries.

Since its enactment, the MMPA has been an important element in the conservation of our nation's living marine resources. The MMPA recognizes that marine mammals are important elements of marine ecosystems and resources of great aesthetic, recreational, and economic significance. The MMPA has been a key factor in the conservation of several populations. For example, the numbers of porpoise killed incidental to tuna purse seine fishing in the eastern tropical Pacific Ocean has been reduced substantially. Seal and sea lion populations along the west and northeast coasts are increasing. The gray whale has recovered sufficiently that NMFS has determined it no longer requires the additional protection of the Endangered Species Act.

Currently, however, our most pressing challenge, as you have already noted, is replacing the MMPA's interim exemption for commercial fishing with a long-term management regime. Such a regime must provide for the conservation of all marine mammal stocks while allowing for the continued use of our nation's important fishery resources. Our proposed regime meets this challenge. It is based on guidelines submitted by the Marine Mammal Commission and was developed in consultation with the U.S. Fish and Wildlife Service, representatives of the fishing industry, representatives of conservation groups, and other interested members of the public.

The regime proposes a dynamic process that would use information gathered during the interim exemption period, and in the future, to govern the interactions between marine mammals and commercial fishing operations. The regime would maintain stocks of marine mammals within or promote recovery to their Optimum Sustainable Populations (OSP) while placing the minimum restrictions necessary on fishing operations.

Although the proposal applies only to commercial fishing, the number of marine mammals removed by other human activities would be considered when making authorizations for taking marine mammals. NMFS would use information collected during the interim exemption to focus research and management activities

under the new regime where they are most needed. The status of each marine mammal stock would be assessed, and the populations in most trouble would receive highest priority for additional research efforts. Management and monitoring efforts would be concentrated on those fisheries that interact with these populations of marine mammals at levels that have the potential to result in significant adverse impacts to the populations.

The proposed regime provides a framework for calculating potential biological removals; that is, the total number of animals that may be removed from a marine mammal population while allowing the stock to remain within or recover to its optimal sustainable population. Using data collected during the interim exemption period, NMFS would prepare stock assessment reports for each stock of marine mammals that interacts with commercial fishing operations in U.S. waters.

These reports would contain information concerning the abundance, growth rate, status with respect to OSP, and future research needs for stocks of marine mammals. Potential biological removal (PBR) values would be examined for each stock and, when necessary, would be adjusted to reflect potential impacts of commercial fishing on depleted stocks, estimates of minimum abundance that are very low, and potential adverse effects on declining populations.

Following public and scientific review of the calculated and adjusted PBR values, NMFS would draft a plan to allocate a portion of PBR for marine mammal stocks to commercial fisheries. The plan would be developed in conjunction with other Federal and State agencies and the Fishery Management Councils. The councils would hold public hearings, solicit public comments, and submit recommended changes to NMFS prior to the allocation of PBR's.

The proposed regime is consistent with the goal of the MMPA to reduce mortality and serious injury to insignificant levels approaching a rate of zero. Research to reduce marine mammal mortality and injury incidental to commercial fishing would continue. Under the proposed regime, the major objective of research efforts would eventually shift from assessing populations and determining impact of incidental removals on population status to efforts designed to reduce mortality incidental to fishing operations as our knowledge increases. When critical problems are identified, they will be addressed in a timely manner. For example, NMFS is planning a workshop in Fiscal Year 1993 to identify viable options to reduce mortality of harbor porpoise incidental to commercial fishing in the Gulf of Maine.

In summary, our proposed regime to govern interactions between marine mammals and commercial fishing operations provides a framework to fulfill the objectives of the MMPA with minimal restriction on commercial fishing operations subject to U.S. jurisdiction.

[The prepared statement of Ms. Josephson may be found at the end of the hearing.]

Mr. STUDDS. Sorry about that light. Thank you very much for fitting in. Dr. Robert Hofman of the Marine Mammal Commission. Dr. Hofman.

STATEMENT OF ROBERT HOFMAN, SCIENTIFIC PROGRAM DIRECTOR, MARINE MAMMAL COMMISSION; ACCOMPANIED BY MICHAEL GOSLINER, GENERAL COUNSEL

STATEMENT OF ROBERT HOFMAN

Dr. HOFMAN. Thank you, Mr. Chairman, and members of the subcommittee. It is a pleasure to be here. My name is Robert Hofman. I am the Scientific Program Director for the Marine Mammal Commission. With me is Michael Gosliner who is the Commission's general counsel. I have submitted a written statement for the record, and I will just briefly explain the Commission's views concerning the National Marine Fisheries Service's proposed regime to govern interactions between marine mammals and commercial fishing operations after the current interim exemption expires.

The Service's proposed regime is based upon and is largely consistent with the recommended guidelines provided by the Commission in July 1990. The Commission's recommended guidelines, in turn, were based upon guidance provided by Congress in 1988 as set forth in Section 114 of the Marine Mammal Protection Act. My written statement provides a more detailed description of the Commission's recommended guidelines and the events leading up to the decision in 1988 to temporarily exempt U.S. fishermen from the provisions of the Marine Mammal Protection Act regulating the incidental take of marine mammals in the course of commercial fishing operations. Further details are provided in the Commission's annual reports to Congress.

The Commission believes that the National Marine Fisheries Service's proposal is both practical and conceptually sound. If accepted and implemented effectively, the proposed regime would benefit fishermen by streamlining the process for getting authority to take marine mammals incidental to commercial fishing operations and by authorizing under certain conditions incidental take from population stocks whose status is uncertain and from stocks listed as endangered, threatened, and depleted. The proposal would benefit marine mammals by reducing the possibility or the risk that incidental take in fisheries by itself and in combination with other types of non-natural mortality would cause any species or population stock to be reduced or to be maintained below its maximum net productivity level, the lower bound of the Optimum Sustainable Population range.

Both fisheries and marine mammals would benefit from the proposed program to identify ways whereby fishing gear and practices might be altered to avoid or reduce incidental taking. Fisheries would benefit by reduction of regulation, by reduction of gear damage caused when marine mammals are caught, and by reduction of the time that fishermen must spend removing and dealing with marine mammals caught in fishing gear. Marine mammals would benefit by reduction of incidental mortality and serious injury to the lowest levels practicable.

The Commission believes that there is particular merit in the process that the Service has proposed to assess and monitor the status of the affected marine mammal stocks and to identify priority research and monitoring needs. The process will ensure critical

scientific peer review and provide opportunity for public participation. Further, it will ensure that available funding and personnel are focused on the most critical problems.

Although the Commission believes that the Service's proposal is both practical and conceptually sound, it is not sure how several aspects of the proposed regime would, in fact, work in practice. It is not clear, for example, how the Service would identify or in status of stocks reports take into account habitat degradation or destruction resulting from such things as coastal development, offshore oil and gas development, or fishery caused declines in important marine mammal prey species. Also, it is not clear how the stock assessments would consider possible subtle decreases in survival or productivity that could result from repeated disturbance from environmental pollution or other factors that may have sublethal effects.

Further, it is not clear whether the formula proposed to be used to calculate the potential biological removal level would in all cases prohibit authorizing take levels that could cause a population's stock to be reduced or to be maintained below its maximum net productivity level. If, for example, the growth potential for a population is being affected by habitat degradation, repeated disturbance, or some type of direct mortality not identified and included in the estimation and allocation of total allowable take, use of the default values proposed to be used to calculate the potential biological removal when the population growth rate is unknown could result in authorizing take levels which cannot be sustained and which would not prevent the affected population from being reduced or maintained below its maximum net productivity level.

In summary, the Commission believes that the Service's proposal is both practical and conceptually sound but that several aspects could usefully be clarified. Mr. Chairman, members of the committee, if there are any questions, I would be happy to try to answer them. Thank you.

[The prepared statement of Dr. Hofman may be found at the end of the hearing.]

Mr. STUDDS. Thank you very much, sir. Ms. Josephson, the NMFS proposal states that "intentional lethal takes will be authorized to alleviate a demonstrated significant negative impact on a fishery." Now, that seems contradictory to U.S. policy on commercial whaling and to the provisions of the International Dolphin Conservation Act which was passed last year. It also seems to be in conflict with the goals of the Marine Mammal Protection Act, nor are there any intentional lethal take provisions, as I am sure you know, in the Endangered Species Act.

On the other hand, the question of how best to manage the marine mammal stocks that are reaching or have reached OSP and are having detrimental impact on native fisheries or on endangered fish stocks, as I understand it, is not addressed or remains unanswered by the NMFS proposal. Can you give us an example of an instance in which an intentional lethal take would be allowed and the process by which the take would be authorized?

Dr. FOSTER. The proposal states that we would allow intentional lethal takes for personal safety in the case of cetaceans and intentional lethal takes in the case of personal safety and the phrase

that you quoted for nondepleted pinnipeds. This came up during discussions with some of the industry groups when they were talking about things that would be a severe economic impact on the fisheries, and I don't have a specific example of what that would be. But it would certainly be a case-by-case decision, and the burden of proof would be on the person requesting the take to make the case.

Mr. STUDDS. I forgot the normal scientific name for seals and sea lions. What are they?

Dr. Foster Pinnipeds.

Mr. STUDDS. I am sorry to hear that. So in that case, it isn't in the event that one is attacked by one of those. Can you elaborate on that a little bit for us?

DR. Foster. I am sorry?

Mr. STUDDS. I realize you don't know—you said can't envision a specific instance because one hasn't been raised with you, but elaborate a little bit on the situation in which the language as it currently stands in your proposal would permit an intentional take of whatever you call them.

Dr. FOSTER. Pinnipeds.

Mr. STUDDS. Pinnipeds, yes.

Dr. FOSTER. You mean in the case of personal safety?

Mr. STUDDS. No. I assume you are not going to be attacked by a seal.

Dr. FOSTER. Well, there are some fishermen who claim to have been attacked by seals. I mean, seriously.

Mr. STUDDS. I am sorry Mr. Young isn't here. Are you talking solely, even in the case of pinnipeds, in instances of personal safety, or are there other circumstances?

Dr. FOSTER. Well, there is that other phrase that you quoted and in the case of some severe economic situation with regard to a fishery, but as I said, I cannot think of a good example.

Mr. STUDDS. And can you say anything more about the process, assuming you had whatever is a good example, and I am assuming you had one——

Dr. FOSTER. Right.

Mr. STUDDS [continuing]. Can you state to me what the process by which that take would be authorized?

Dr. FOSTER. It would be a rulemaking.

Mr. STUDDS. It would be a formal rulemaking. OK. One of the concerns we have heard from the environmental community is that the Fiscal Year 1994 NMFS budget contains funding requests for monitoring incidental takes and for stock research but no provisions for gear research. Is that the case, and, if so, how come?

Dr. FOSTER. There is no specific request for gear research. That is correct. There is some ongoing work on gear research, however, out of base funds. And then we are also looking—we are about to hold a workshop on harbor porpoise, and as a result of that workshop, we expect to get some suggestions for gear research which we will then fund. We do have money in the budget for that this year.

Mr. STUDDS. I have a question for Dr. Hofman, and I will hold back for a moment. The staff informs me that a potential case like we were discussing a few moments ago might be in the situation where California sea lions are doing battle with salmon who them-

selves may be endangered, thereby raising several kinds of interesting questions to say nothing of the gentleman from Alaska who passing by might be attacked either by the sea lions or by the salmon, I assume. We can all think about that for a moment. The gentleman from Delaware.

Mr. CASTLE. How much would the proposal cost in Fiscal Year 1994?

Dr. FOSTER. How much would the proposal cost in Fiscal Year '94?

Mr. CASTLE. Yes.

Dr. FOSTER. In 1994, what we are proposing is a phase-in implementation strategy where for the first couple of years we would be getting the system in place. We would expect to immediately begin some of the observations on the category I fisheries, and we do have about $10 million in our budget already that we spend on observer coverage and stock assessment.

Mr. CASTLE. And you say it is phased in.

Dr. FOSTER. Phased in.

Mr. CASTLE. Can you carry me through a few fiscal years on that please?

Dr. FOSTER. Well, the assumption is that for some of the fisheries—let us say that you have a fishery where the take is exceeding the PBR. Rather than have an immediate implementation of that allocation or that quota which could cause severe economic impact to the fishery, we are proposing to phase it in and give them about five years to reach the PBR so that you would focus attention on getting the system in place. Then you would focus your attention on the problem fisheries, and you would begin slowly to ratchet down their take to the PBR.

Mr. CASTLE. And in terms of our costs in funding all of this, can you estimate the cost in each of those five years?

Dr. FOSTER. In each of the five years?

Mr. CASTLE. More or less. If you don't know exactly——

Dr. FOSTER. We could do that for you if you would like.

Mr. CASTLE. You don't have it presently at hand then?

Dr. FOSTER. We have taken a preliminary look at what we think full implementation of the proposal would cost. Right now we are spending about, as I said, $10 million implementing the interim exemption, and that is not complete implementation. You know, it is like everything else. You do the best you can with what you have. We estimate that if we completely implemented this proposal, at full implementation, it would cost about on the order of $19 million. Some of that money could be recouped through registration fees.

Mr. CASTLE. OK. Thank you. I have no further questions, Mr. Chairman.

Mr. STUDDS. The gentleman from New York.

Mr. HOCHBRUECKNER. No.

Mr. STUDDS. The gentleman from California.

Mr. HAMBURG. No questions.

Mr. STUDDS. The distinguished gentleman from Alaska.

Mr. YOUNG. Mr. Chairman, I am glad there is no sea lions present, but that is all right.

Mr. STUDDS. You be very careful.

Mr. YOUNG. Diana, how do you propose to allocate marine mammal takes? Since NOAA has twice recently modified council allocation decisions for fisheries as well as turning down some conservation-based quotas recommended by the council, should we expect more of the same for marine mammals if your proposal is adopted?

Dr. FOSTER. We would expect to allocate the quota through a very elaborate process of input. We would come up with an initial cut at the allocation, and then we would give that to the councils, to the states, get their recommendations, factor their recommendations into the allocation and then do it.

Mr. YOUNG. NMFS would do it?

Dr. FOSTER. Yes.

Mr. YOUNG. OK. Does your plan propose allocating regulating subsistence takes by the Alaska natives?

Dr. FOSTER. No. Our authority right now under the MMPA to regulate subsistence takes is limited, as you know, to control over what they do with the products. And because of that, given our scenario—this particular proposal—we would subtract subsistence takes off the top of the PBR because we do not have the authority to regulate subsistence.

Mr. YOUNG. You are not asking for authority?

Dr. FOSTER. We have not asked for that authority.

Mr. YOUNG. Good. That is good. You know, my interests are twofold, of course, and there are two different areas where the marine mammals and how they affect the fisheries in Alaska are crucial to not only the subsistence fishery but also the existing commercial fishery and those communities that depend upon the fishery. And we have to make sure that there isn't an enthusiasm that balance gets unbalanced because right now, I think, it is working fairly well although we have been under some challenges in recent years to stop some of the activity that has taken place which would directly affect many of my people up there. And as far as the natives go, you know, this is something I have worked very hard on, and I would like—and we will have some input form those groups specifically and maybe some suggested changes. And we will have to look at that as we go by. Thank you, Mr. Chairman.

Mr. STUDDS. I thank the gentleman. Dr. Hofman, an elementary question really. Based on the information we have gathered over the past five years, do we really know enough about marine mammal fishery problems and marine mammal populations to undertake a management regime as complex as the one being proposed by NMFS?

Dr. HOFMAN. I think, Mr. Chairman, that the National Marine Fisheries Service's proposal recognizes the complexity of the issue and sets forth a proposed regime which will work on minimal data. To make the initial management decisions—what basically would be required is a minimum population estimate and some knowledge of the relative status of the population. And even if status is unknown, with the minimum population estimate, they can proceed. So the intent is to resolve a very, very complex situation by taking what, in my view, is a very, very balanced and rational approach. That is to develop a system which will provide protection to marine

mammals but to the largest extent possible minimize the possible impacts to fisheries.

Mr. STUDDS. You spoke about prey competition between humans and marine mammals. Our staff has been told that some marine mammal and sea bird populations of the Pacific Northwest and in Alaska may be declining due to changes in the quantity, quality, and size of their prey, changes caused by heavy fishing pressure on certain species at key times of the year. If this competition theory is really an issue in the management of marine mammals, I guess the time to address it is now, when we are going to be reauthorizing both the Magnuson Act and the Marine Mammal Protection Act. Do you have any recommendations specifically on that point as we look at both of those reauthorizations?

Dr. HOFMAN. Two suggestions, I think, Mr. Chairman. First, in terms of background regarding the Bering Sea and Gulf of Alaska. The Commission organized and held a workshop back in December of 1990 where we looked at that issue, and it is clear that Steller sea lions, for example, and some populations of harbor seals, and as many as four species of fish-eating birds in the Arctic or in the Bering Sea and Gulf of Alaska are declining. There is a correlation with fisheries development, but correlation does not prove cause and effect; there are also some indications of possible natural changes so these are complex issues.

The Marine Mammal Protection Act itself, although it has in the statement of policy that one of the goals is to protect important habitats, really does not have specific provision for protecting habitat and habitat components which would be, for example, important prey species.

The Magnuson Act, on the other hand, when it talks about calculating optimum yield based upon the allowable biological catch, does, in our view, direct the Fishery Management Councils and the National Marine Fisheries Service to take into account biological/ecological factors, and this was noted in the guidelines that the Commission provided to the Service in July 1990. We identified this as an issue that probably should be taken up under the Fishery Conservation and Management Act or perhaps both it and the MMPA. The issues are relatively clear. There are a suite of ways where they might be addressed. At the present time, other than identifying what the issues are and the possibilities, the Commission doesn't have a specific recommendation.

Mr. STUDDS. Are you intending to develop one? Do you know?

Dr. HOFMAN. I, in all honesty, don't know the answer to that question.

Mr. STUDDS. I appreciate that. I see the gentleman from Alaska has fled due to reports of approaching sea lions, I assume. I must say that I was so struck by that, I have been inquiring of staff what a possible situation could be, and the gentleman from California will be shocked to know that it is in or near his district that these alleged assaults have occurred. Apparently, the problem arises when a fisherman goes to his dingy and finds a reclining sea lion therein or even on the dock between him and his boat. And there are some fishermen who don't take the first obvious step of a polite request to leave and who would rather be more direct, I gather, and sometimes the sea lions have some difference of opin-

ion as to whose dock or whose boat it is. I didn't know they were that fierce in California. I had several conversations myself with them on the pier in San Francisco, but I guess they knew there was little danger at the time. The gentleman from New Jersey.

Mr. PALLONE. No questions.

Mr. STUDDS. The gentlewoman from California.

Ms. ESHOO. I will pass my questions, Mr. Chairman.

Mr. STUDDS. Does the gentlewoman from California wish to say a word on behalf of her sea lions or are you——

Ms. ESHOO. Thank you, Mr. Chairman. I would just like to say that within the boundaries of my magnificent district, a miracle takes place every year at Anna Nuevo with the elephant seals that come in. It is something that Californians and people from all over the world flock to my district to see. I am pleased to be on this committee, and the subject that is at hand is important and near and dear to my heart. I do have some questions that I would like to ask later on, and thank you for calling on me, Mr. Chairman.

Mr. STUDDS. I thank the gentlewoman. We thank you very much, and we look forward to working with you as we proceed with the reauthorization. And we will go now to panel number II. If you can rearrange yourselves as quickly as logistics will allow. There are seven members of this panel. We welcome you. We are going to take you in the order in which your names appear on the witness list. We are going to ask you to, as usual, confine your oral presentation to no more than five minutes, to respect those lights, and we will withhold our questioning until you have all concluded your testimony. We will begin with Ms. Suzanne Iudicello, Center for Marine Conservation. Ms. Iudicello.

STATEMENT OF SUZANNE IUDICELLO, SENIOR PROGRAM COUNSEL, CENTER FOR MARINE CONSERVATION

Ms. IUDICELLO. Good morning, and thank you, Mr. Chairman, and members of the subcommittee. We are delighted to have this opportunity to present our views on reauthorization of the Marine Mammal Protection Act. My name is Suzanne Iudicello. I am counsel for the Center for Marine Conservation, and our statement today is made also on behalf of the Environmental Defense Fund, Friends of the Sea Otter, Greenpeace, The Marine Mammal Center, the National Audubon Society, and the World Wildlife Fund.

As you know, and as you can see by the handsome panel before you, the diversity of views on all the aspects of the MMPA is as varied as the interested communities and constituencies affected by the provisions of this landmark legislation. Today, we are going to limit our remarks though to those parts of the law that govern incidental take of marine mammals in commercial fishing because we too, as did you, recognize the deadline that is coming down upon us. As the reauthorization proceeds and your deliberations become more detailed, we expect that you will need to hear individually from a variety of groups who represent a very broad spectrum of views on the issue.

Rather than recap the MMPA background that is in my written statement, I would like to proceed directly to where we stand now.

I would be happy to answer any questions about the events that led up to the 1988 amendments if you have them.

We would like to report to you today briefly on the outcome of the Marine Mammal Exemption Program that has been in place since 1989, our criticisms of that program, our response to the agency's proposed regime, which was presented to you by the previous panel, our key concerns for the reauthorization, and finally a little crystal ball prognosis which is quite cloudy on the prospect of the negotiations that we are engaged in with our colleagues in the fishing industry.

As you know, the 1988 amendments to Section 114 in the MMPA created a five-year program exempting commercial fishing from the incidental taking prohibitions on the Act. The objective was to provide time to collect reliable information about the interactions between marine mammals and commercial fishing and to allow commercial fishing operations to continue despite the Kokechik decision.

The MMEP or the Marine Mammal Exemption Program that was implemented after the 1980 amendments hasn't entirely fulfilled all of our expectations or even the requirements. We have some concerns about the program, but we would like to say before we start listing the problems that the key point is that whatever its shortcomings, the Marine Mammal Exemption Program has collected a lot of information that we believe can be useful, can be used to form a basis for the regime that we craft next, and where we go from here.

The program results, including the numbers of vessels registered, the categories of fisheries, marine mammals taken and so forth, are all detailed in our written statement and so I won't go into that now. But I will indicate that the principal problems have to do with the basic size of the universe; that is, we have found that the agency is unable to answer the question how many vessels are fishing? Therefore, they cannot answer the question of those fishing, how many are registered? Of those registered, how many report? Of those that report, what is the incidental take level? Of the incidental take, how much is mortality? And so as you start to slice this reporting down further and further, you get a less accurate picture of what is really going on.

The second major criticism we have had of the program is that it has had no capacity for in-season management; that is, even though there is a lot of paperwork going on, the results of the paperwork don't find their way into the system until well after the season is over. So that if the program had ever surfaced a problem even though the Section 114 gives the agency authority to take action during the course of a fishery, the information has never been gained in time to do anything about that. Reports from observers indicate that mammal interactions are significantly underestimated by the logbook reports.

Moving on to the agency's framework, we have a variety of concerns mostly related to the issues such as current carrying capacity, how the regime proposes to incorporate nonlethal takes, and some other concerns that are fairly small and detailed, but, again, these are listed in our statement.

I would like to leave you just with a few key points about where the community is coming from on the reauthorization. We do believe we should retain the fundamental nature of the statute. We believe that whatever the incidental take authorizing process is, it should provide a level playing field for all users of the resource. Acquiring information on the status and trends of marine mammal stocks is critical to our decisionmaking, and that marine mammals that are endangered or threatened should receive no less protection than other endangered species. Thank you very much. I would be pleased to answer questions.

[The prepared statement of Ms. Iudicello may be found at the end of the hearing.]

Mr. STUDDS. Thank you very, very much. Let me just say that anyone in the audience who wishes to is welcome to come and sit around this lower tier here. I know there are not enough seats in the room. Do not be bashful. Well, all right. Come on up if you would like. There are no sea lions up here. I should observe I have been corrected by the gentleman from—I will talk for a moment if it will make you feel better—the gentleman from Alaska's staff informs me there have been several instances in which fishermen have indeed been attacked by sea lions who have leapt up out of the water, apparently, and really assaulted them—apparently, not all of these attacks occurred in a bar. Is that correct? We shall see. OK. Nobody wants to sit up here. Our next witness, Mr. Gerald Leape speaking for Greenpeace.

STATEMENT OF GERALD LEAPE, LEGISLATIVE DIRECTOR, OCEAN ECOLOGY, GREENPEACE, USA

Mr. LEAPE. Thank you, Mr. Chairman, members of the subcommittee. My name is Gerald Leape, and I am the Legislative Director for Greenpeace here in the U.S. I want to thank you for the opportunity to present our views on the reauthorization of the Marine Mammal Protection Act. My statement today is also on behalf of the following groups: The Center for Marine Conservation and the Animal Protection Institute. In the summary of my written statement, I will focus on general priorities for a new regime to govern the interactions between fisheries and marine mammals and will briefly detail specific alternatives for funding this program.

As you have heard, we are once again embroiled in negotiations with the fishing industry, an experience we swore we would never go through again. Because we are in the midst of these negotiations, my comments on substance must be general in nature. We believe that the Federal Government should continue to aggressively pursue research to determine the population status and health of all the marine mammals off our coasts.

In addition, we should focus on the status of marine mammals before they are listed under the ESA or the MMPA with the goal of preventing the need to list. We must also maintain current protections afforded threatened and endangered animals under the ESA. Finally, we must develop a system that incorporates a series of incentives and penalties that will bring about a continued reduc-

tion in takes wherever they are significant either in number or in impact.

Although we do not have the final details worked out on a program to replace the current Marine Mammal Exemption Program, the appropriations train will leave us at the station if we don't begin to look at alternatives for funding this program. As a ballpark figure, we will use the NMFS estimate of $19 million for implementation purposes.

Although there is considerable interest in a single financing package for Magnuson and the MMPA, we are concerned that with the admirable intent of coordination comes the tendency to force single solutions on completely different problems, and instead of seeking OSP for marine mammals as a priority under the MMPA, I fear that we will see MSY lurking in the background.

Our first stop is to attempt to increase appropriations for Fiscal Year 1994. We will go together with the fishing industry to attempt to get the Appropriations Committee to increase the funding for implementation from $10 million to $19 million. We will attempt to get this funding increased through a number of different relevant line items. We will also take a look at the Saltonstall-Kennedy program to see whether there is any germane use of these funds to achieve our objectives.

In the event we are unsuccessful in getting the complete $9 million increase in new funding, we will assess whether there is any way to reprogram funds being collected currently through taxes and fees on the industry. As a complement to that effort, we would also recommend looking at repealing the marine fuels exemption to see if that action would lead to additional funding for these purposes.

The next option is to develop a licensing system that would affect all fishers, but those who have the greatest interaction problem should pay the greatest fee. Even though observers would be required on every boat, this prospect of lower fees would encourage full participation in the program. This provides a natural structure for incentives and disincentives to make the program work.

A fifth outlet is to tax the fish from all boats, but the highest tax would be from those with the greatest interaction problem. Fines and penalties through natural resource damage assessments present another opportunity for funding. These have been used periodically over the years, but use would have to be systematic in order to be an effective funding source.

A final outlet, which has not been discussed with the whale-watching industry themselves but must be, is the possibility of assessing a fee to help pay purely for research into the status of all cetaceans. To make this option work, they must be full partners in the process.

Finally, we need to develop a mechanism for collecting these new fees that will ensure that they are used for the purpose for which they are intended and not for deficit reduction. There are some members of the industry who say this is impossible. We have to show them that it is not. As I said earlier, these do not represent final negotiated positions. They are recommendations.

Mr. Chairman, I look forward to working with you and the subcommittee throughout the reauthorization process. I appreciate the

opportunity to testify, and I would be happy to answer any questions.

[The prepared statement of Mr. Leape may be found at the end of the hearing.]

Mr. STUDDS. Thank you very much. Next is Ms. Sharon Young speaking for the International Wildlife Coalition. Ms. Young, welcome.

STATEMENT OF SHARON YOUNG, WILDLIFE CONSULTANT, INTERNATIONAL WILDLIFE COALITION, NORTH FALMOUTH, MASSACHUSETTS

Ms. YOUNG. Thank you. I am Sharon Young, a wildlife consultant with the International Wildlife Coalition headquartered in Falmouth, Massachusetts, and I am happy to be from your district, Mr. Chairman. I appreciate the opportunity to testify today on behalf of the International Wildlife Coalition, the Humane Society of the United States, the Animal Protection Institute, the Earth Island Institute, and the Sierra Club with a combined worldwide membership of 2 3/4 million members.

One of the primary goals of the Marine Mammal Protection Act is to reduce marine mammal mortality to "an insignificant level approaching zero." The zero mortality rate goal is fundamental and must not be eroded. Without it, marine mammals cannot be expected to recover to or remain at optimal sustainable populations. Poor enforcement of the MMPA in the past five years of the Marine Mammal Exemption Program have left marine mammal populations without sufficient protection from excessive kills by the fishing industry. Our overriding concern is that reauthorization of the MMPA must achieve verifiable and significant reductions in marine mammal mortality.

The past five years of data gathering have shown that the problems are greater than either Congress or the American public suspected. Instead of taking immediate action, the National Marine Fisheries Service has proposed a system which, by their own admission, will not even begin to address critical issues of caps on the kills of marine mammals, the development of monitoring systems, or enforcement measures for at least two more years. In the interim, they have stated that they expect fisheries to voluntarily affect reductions in mortality. Voluntary reductions in take have not occurred during the past five years despite congressional mandate. In fact, large numbers of marine mammals are intentionally killed in many fisheries.

There are serious omissions in the permitting process. Recreational fishermen using gear types known to interact with marine mammals are not required to register. Required registration would subject them to the strictures of the Act. It would also add needed funds to the NMFS program. Experimental fisheries using methods known to kill marine mammals need monitoring until they can prove that no interaction problem exists.

NMFS currently estimates that combined human interactions kill more than 100,000 marine mammals each year, and it has placed more than half of marine mammal stocks in categories of concern. During the interim exemption program, three more stocks

of marine mammals have been accepted for or proposed for listing under the Endangered Species Act or the MMPA for depleted status. Two additional stocks have experienced severe losses and are being considered for Petition action to list them for protection.

Research to develop methods and technology to reduce kills has not occurred except in crisis situations. This tragic pattern of crisis management must cease. NMFS must take a proactive stance to prevent problems. It must fund mitigation research and mandate immediate reductions in kills based on data gathered during the past five years. Investing in preventing problems is much less expensive fiscally and biologically than trying to correct serious species depredations.

Compliance with the Act is also decreasing. The past five years have shown declines in both the number of boats registered and the number of logbooks submitted by boats. Submitted logbooks seriously underestimate take. Onboard observers find on average six times as many animals killed as reported. Some fishers refuse to take observers. Enforcement borders on the nonexistent. These are but a few of the problems of the existing program. They are detailed more in our written statement to which I hope you will refer.

Development of a regime which achieves a verifiable and significant reduction in marine mammal mortality is paramount. We, therefore, make the following recommendations: One, establishment of fishery-specific regulations limiting the take of marine mammals to be in place within two years of the authorization of the MMPA. Two, allocation of moneys to fund and conduct research into mitigation techniques to reduce marine mammal mortality. Three, the immediate and continual reduction of incidental and intentional lethal take to work toward the zero mortality rate goal of the MMPA with emphasis on endangered, threatened, and depleted stocks.

Four, the use of historic carrying capacity wherever possible as a basis to make decisions on Optimal Sustainable Populations. Five, strict and mandatory enforcement and penalties to ensure compliance with the Act and its regulations on issues of registration, monitoring of catch and quotas. Six, reduction of omissions and inequities in the permitting process.

I would like to close by emphasizing that prior to human exploitation in fisheries interactions, marine mammals did not overpopulate, degrade the environment, or deplete fisheries resources. To the contrary, before the development of large-scale fisheries, stocks of marine mammals and commercially important fish stocks were at an all time high. It is not necessary to allow high rates of kill of marine mammals to support viable and productive fisheries. Therefore, we implore Congress to reauthorize a strong MMPA which includes our recommendations. We believe that this approach will provide for the recovery of marine mammals and the wise conservation of marine resources and is in keeping with the wishes of the American people and the spirit and the intent of the MMPA.

Once again, I would like to thank you for the opportunity to address the subcommittee with our concerns. We are happy to assist you in any way to improve this critical situation. Thank you.

[The prepared statement of Ms. Young may be found at the end of the hearing.]

Mr. STUDDS. Thank you. You really don't have to rush. Those lights do not apply to people from Cape Cod.

Ms. YOUNG. Now you tell me.

Mr. STUDDS. Next is Dr. Andrew Read from the Woods Hold Oceanographic Institution on Cape Cod. Dr. Read.

STATEMENT OF ANDREW READ, VISITING INVESTIGATOR, WOODS HOLE OCEANOGRAPHIC INSTITUTION, WOODS HOLE, MASSACHUSETTS

Mr. READ. Thank you. Mr. Chairman, members of the subcommittee, my name is Andrew Read, and I work as a biologist at the Woods Hole Oceanographic Institution where I study the ecology and population biology of dolphins and porpoises. I would like to thank you for this opportunity to present my views on the management of interactions between commercial fisheries and marine mammals.

We have several important conflicts between mammals and fisheries in New England. Foremost among these is the incidental take of harbor porpoises in sink nets in the Gulf of Maine, which I will discuss in some detail. We also have a significant incidental catch of offshore dolphins in the swordfish driftnet fishery, and continuing interactions between the endangered North Atlantic right whale and fixed fishing gear. These two latter cases exemplify some of the difficult issues surrounding this conflict. Dolphins taken in the swordfish driftnets are poorly known, and we have little or no information on their abundance or status. Entanglements of right whales affect a highly endangered population for which even a single mortality may have serious consequences.

The most serious issue that we face, however, is the incidental take of porpoises in groundfish sink gill nets. In the five years since the start of the interim exemption program in 1988, we have greatly increased our knowledge of the scope of this problem and of the effects of these takes on the porpoise population. Our present understanding is that these incidental catches are unsustainable. NMFS has proposed listing this population as threatened under the Endangered Species Act due primarily to the high incidental catches in the gill net fishery.

The most recent estimates of this incidental take are several times greater than the PBR level outlined in the NMFS proposal. Additional takes are also known to occur in Canadian waters and in coastal fisheries along the Mid-Atlantic states. The New England Fishery Management Council has adopted a goal of reducing the take to two percent of the population within four years, but this will not meet the proposed PBR level.

Current research is directed at mortality reduction through time, area closures, gear modification, or the use of deterrents. At the present time, it is unclear which combination of these measures, if any, might prove effective in reducing takes to the PBR level.

In general, I support the concepts contained within the NMFS proposal, and I believe that they will be workable in New England. Clearly, it is time to institute some type of long-term management

system to deal with marine mammal fisheries conflicts. We cannot let the interim exemption expire without some framework to replace it because many fisheries including some of those in New England would be unable to obtain incidental take permits and would be forced to close. In addition, we should not extend the interim exemption because of the limited protection for marine mammal populations contained within its regulations.

The NMFS proposal maintains the main goals of the Marine Mammal Protection Act and for the most part provides practical means of obtaining these aims. The zero mortality goal is a particularly important objective that drives management to reduce incidental mortality in all fisheries. In some cases, such as the entanglement of porpoises in gill nets, it is unlikely that we will soon achieve this goal, but it is certainly worth striving for.

The NMFS proposal will also keep the objective of maintaining stocks within their Optimum Sustainable Population or OSP range. For many stocks, however, it is unlikely that we will be able to make OSP determinations in the foreseeable future. The alternative mechanism contained within the proposal, the PBR process, allows for a conservative level of removals for stocks for which it is not possible to make OSP determination. This conservative approach is necessary because of the considerable scientific uncertainty regarding the status of most marine mammal populations.

The NMFS proposal will require continued monitoring of fisheries to document incidental take levels, and I would like to note several important issues here. First, NMFS should be allowed to place observers on board all vessels except those which safety factors preclude such monitoring. Without this authority, it is possible that vessels with high mammal bycatches will not be sampled in voluntary observer programs.

Second, we need to develop real time data collection systems to improve the speed with which bycatch information can be made available to managers and to the fishing industry. Third, unless significant changes are made to the logbook system so that participants benefit from the collection of accurate and timely data, this portion of the program should be discontinued.

Finally, it is critical that NMFS maintain a flexible attitude toward enforcing quotas should they be necessary. In complex situations such as the Gulf of Maine where participation in the gill net fishery is seasonal and varies with region, the simple application of universal quotas will not work.

In closing, I would like to mention the harbor porpoise working group of which I have been a member since 1990. The group is a coalition of organizations representing the fishing industry, environmental groups, scientific institutions, and government. Our primary goal is to find ways of reducing the incidental take of porpoises in gill nets, of minimizing impacts to the fishery. The group is informal and at times raucous, but by agreeing to this common goal, we have made considerable progress.

In this reauthorization debate, your task is much the same as ours—to reduce the incidental take of marine mammals while minimizing impacts on the fishing industry. I believe that a strong Marine Mammal Protection Act incorporating the major elements

of the NMFS would go a long way toward achieving this goal. Thank you.

[The prepared statement of Mr. Read may be found at the end of the hearing.]

Mr. HOCHBRUECKNER. [presiding] Thank you, Dr. Read. Next we have Mr. Alvin Osterback, Jr., Assembly Member from the Aleutians East Borough, Anchorage, Alaska. Mr. Osterback.

STATEMENT OF ALVIN OSTERBACK, JR., ASSEMBLY MEMBER, ALEUTIANS EAST BOROUGH, ANCHORAGE, ALASKA

Mr. OSTERBACK. Mr. Chairman, my name is Alvin D. Osterback. I am here today representing the Aleutians East Borough, the Gulf Coast Coalition, its communities, and the fishermen of our region.

For those of you who don't know where we are, the Aleutians East is located in the far west portion of the Alaska Peninsula and the eastern most islands of the Aleutians. The residents are primarily of Aleut descent who have lived in the Aleutians East region for thousands of years. We have made the difficult transition from a subsistence to a commercial lifestyle. Our fishermen operate a small boat fleet to fish for salmon, cod, halibut, herring, crab, and rockfish. Our communities are solely dependent on fishing for employment, and fishing provides our tax base. Without the ability to continue our commercial fisheries, we would be forced back to a subsistence culture with no opportunity for other employment. Some of my communities would not survive and would join the list of ghost towns that already dot the southwest Alaskan coast.

Our economic survival has required the Aleutians East and its fishermen to become active participants in discussions over the MMPA; specifically, authorization for the incidental take of marine mammals in commercial fisheries. We are at risk because we are located near threatened Steller sea lion rookeries. Additionally, scientists have become concerned about the status of declining harbor seal populations in southwest and western Alaska.

The Aleutians East Borough and its Alaska native fishermen want to be active participants in all future efforts to mitigate impacts on marine mammal stocks in serious trouble. All too often we have been blindsided by regulatory initiatives aimed at us because we are the most visible human presence in the region. For example, the Alaska Peninsula drift gill net and seine fleets were classified as category I fisheries in 1988 based on highly speculative information that there was a high level of marine mammal takes by our fleets. What we found, however, when we invited observers on our boats was that there are virtually no lethal takes of marine mammals in our fisheries. Our fleets were then removed from the category I list and placed on a category II list.

If there is a problem with marine mammals in our region, we want to be part of the solution. We accept the need for reasonable regulation of commercial fisheries in so-called hot spot situations, meaning fishery/mammal interactions at significant levels when the species is in decline or for which its status is unknown. Unfortunately, I cannot give you any specific legislative recommendations at this time. I am part of the negotiating team comprising the

fishing industry, environmental groups, and the government to develop a proposal for the Congress. We have agreed in good faith to hold off promoting any specific proposal until the group is finished with its discussions.

What I can do, however, is to appeal to you to act quickly on this issue. We run the risk of having fisheries shut down on a nationwide basis if Congress doesn't act by October 1, 1993. My communities and our fishing industry could conceivably grind to a halt. We just cannot afford to sit out our fishing seasons waiting for the Congress to finish the legislation. In order to help you meet this timeframe, our negotiating group has put the discussions on a fast track. Our goal is to have a proposal to you in the first week of June.

It is my belief that the negotiating group will succeed in narrowing the range of issues for this subcommittee to consider. If we cannot come to a consensus on an entire package, the Congress must take the issues remaining in dispute and settle them as part of this year's legislative process. If our negotiating group cannot come to grips with these issues in the timeframe we have set out for ourselves, it is not likely that more time would resolve our differences. Thank you for giving me an opportunity to testify on an issue of critical importance to the economic survival of my region. Thank you, Mr. Chairman.

[The prepared statement of Mr. Osterback may be found at the end of the hearing.]

Mr. HOCHBRUECKNER. Thank you, Mr. Osterback. Next, Mr. Guy Thornburgh, Executive Director of the Pacific States Marine Fisheries Commission from Oregon. Mr. Thornburgh.

STATEMENT OF GUY THORNBURGH, EXECUTIVE DIRECTOR, PACIFIC STATES MARINE FISHERIES COMMISSION, PORTLAND, OREGON

Mr. THORNBURGH. Thank you. I am Guy Thornburgh. I represent diverse groups of fisheries interest along the Pacific Coast—sport charter boats, Indian tribes, recreational anglers, commercial fishermen, and State fish and wildlife agencies.

Much of the public has a serious misconception of the status of marine populations and how these populations interact with fisheries. The facts are that most marine mammal populations on our west coast are not depressed, the fisheries are not jeopardizing the well-being of these marine mammal populations, and many fisheries, frankly, are quite negatively impacted by large numbers of marine mammals.

The gray whale, once hunted to depletion, has recovered to its original population size. California sea lions have increased to a level that they are expanding beyond their traditional range, and the National Marine Fisheries Service says their abundance may be higher than any historic level. Harbor seals are packing the bays of Washington and Oregon, increasing at six to ten percent per year. Northern elephant seals and California harbor porpoise are well within the statute's goal of OSP, and common dolphins are so common that their numbers exceed 270,000. The West Coast is unique with its abundance of marine mammals in spite of tens of

thousands of commercial fishing vessels and in spite of millions of marine anglers. Fishing on the West Coast is not preventing the growth of marine mammal populations.

The symptoms in our region of the Nation of this abundance in marine mammals are numerous. Sea lions force California charter boats to abandon their traditional fishing grounds. Marine mammal teeth marks occur on 40 to 50 percent of the spring chinook salmon ascending the fish ladders at dams on our troubled Columbia River with its endangered species of salmon. Harbor seals are so dense in Puget Sound that their feces have contaminated shellfish beds resulting in closures of fisheries to protect public health. Tribal gill nets in Washington lose 30 to 50 percent of their fall chinook salmon catch to harbor seals, and anglers in southwest Washington lose up to 60 percent of their troll-hooked fish. Sea lions are now impacting urban anglers upriver from Portland 125 miles from the ocean, and Herschel's buddies, the sea lions at the Ballard Locks, will likely terminate the run of wild steelhead.

These problems result because part of our society so feverishly embraces protectionism. As a nation, haven't we learned from the overprotection of elk in Yellowstone Park? And haven't we learned from the overprotection of the wild horses? The government thins the horse herds with expensive adoption programs. Can you imagine an adoption program for California sea lions?

The Act, as written, could be implemented more liberally, but, instead, its implementation is deliberately and unrealistically lopsided toward protection. For example, the regulations to implement the Act's definition of harassment includes deterrence as a form of harassment. In other words, citizens are prohibited from simply chasing marine mammals away. And recent regulations have tried to prohibit the public from feeding any marine mammals, and they have proposed further restriction on whale-watching activity.

And after two decades of the Act, no State wants to accept management authority for mammals because it has been made too burdensome, too costly, and too restrictive of wildlife management options. And only 6 of 64 stocks of marine mammals are listed as OSP. Why so few? Gray whales and California sea lions are at or near historic levels, but the government fails to declare them recovered. And the Federal agencies who manage our resources have not proposed any legislative or regulatory solution to the conflicts we experience on the West Coast.

Now, for us, relative to the MMPA—we believe the roof is beginning to leak on that statute by the unnatural circumstances this type of protection creates, and we have seven solutions. One, acknowledge that nothing in the Act is intended to abrogate treaty Indian rights so tribes can proceed with co-management of the mammal stocks. Two, provide an avenue for our West Coast states to help research and manage these populations. It is obvious that the National Marine Fisheries Service alone is not getting it done.

Three, allow citizens the right to chase marine mammals away from docks, sport boats, et cetera, without having to get some kind of Federal permit. Four, allow governmental officials to lethally remove nuisance animals when they threaten valuable living marine resources. Five, continue to allow commercial fishermen to take depleted animals and the right to protect their gear and

catch. Six, direct the focus of limited fiscal resources at stocks in the Nation that truly are in need of help and are approaching the threatened list or endangered list. Seven, and finally, please acknowledge for us your interest in a balanced approach to the ecosystem that will enjoy not only the benefit of recovered marine mammal populations but will also recognize the value and pleasure of the various forms of fishing in our oceans. Thank you.

[The prepared statement of Mr. Thornburgh may be found at the end of the hearing.]

Mr. STUDDS. Thank you, sir. I apologize for having to leave briefly. I am never going to leave again I will say to the gentleman from New York. When I left, you were discussing marine mammals. I come back and you are discussing horses. It is a most amazing transition I have ever heard. I apologize, Mr. Thornburgh and Mr. Osterback. The final member of the panel is Mr. Richard Gutting of the Blue Water Fishermen's Association. Mr. Gutting, welcome.

STATEMENT OF RICHARD GUTTING, JR., BLUE WATER FISHERMEN'S ASSOCIATION

Mr. GUTTING. Thank you, Mr. Chairman. I am Dick Gutting. I represent the Blue Water Fishermen's Association. Our association is very grateful to you to give us this opportunity to talk with you today.

We are very concerned that the proposal you have heard from the National Marine Fisheries Service is based upon a very faulty understanding of commercial fisheries and misses the real needs of both mammals and commercial fishermen. Unless this committee in its wisdom changes this proposal, we think we are going to waste a lot of government and industry time and effort, and we are going to overregulate working people that don't need additional government regulation.

For those of you that aren't familiar with the Blue Water Association, we represent the vessels along the Atlantic and in the Gulf of Mexico which harvest tuna, swordfish, and other migratory species. These vessels last year landed about 20 million pounds of food, and when they were first sold, it was worth about $75 million.

Blue Water was formed several years ago and has a very deep and strong commitment to conservation. Since we were formed, our members have tagged fish, released them alive. We have brought back thousands of final samples. We are experimenting with gear to avoid bycatch in the Gulf of Mexico all on a voluntary basis. We believe in our hearts that we are true conservationists, and we were stunned, Mr. Chairman—we were set back on our heels three weeks ago when we learned from the National Marine Fisheries Service that our fleet of longline vessels not only was a problem, but it was one of the major six problem fisheries in the United States.

Our skipper's experience is that when they go out, marine mammals sometimes get entangled in the lines, but it would be several years of fishing before a vessel might actually kill one of these animals. Some of our skippers have never killed a marine mammal. They were shocked that they were identified in this new PBR

system as being a major problem. Well, it certainly got our attention, and we began to investigate. How could this possibly have happened?

One of the problems we believe is the definition of fishery. The system the government has come up with depends upon identifying fisheries. What they have done on the Atlantic Coast is they have lumped a whole series of fisheries together—the tuna fishery, managed separately from the swordfish fishery, managed separately from the shark fishery. These are fisheries in different parts of the ocean. Some of our vessels fish off the Azores, South America, in the Gulf of Mexico, off of New England—in vastly different areas. They use different gear. Some of the gear is set underwater and is fixed to the bottom. Some floats on the surface. Sometimes you fish during the day. Sometimes you fish during the night. You use different baits. They have lumped all of these people together in one fishery, and they said that this is a problem fishery. And yet if you look at the West Coast when they define fisheries, it is much more precisely. It is particular gear on a particular area. Now, obviously, if you lump everybody together in one big fishery, the numbers begin to look bad.

But that is not the only problem with this proposal. We went and looked at the data that suggested that we were killing large numbers of mammals, and there were some bizarre things in that data base. The government was saying that we were killing Steller sea lions and California sea lions. These are animals that are found in the Pacific. The numbers just didn't square, Mr. Chairman. They said there were 820 vessels. That doesn't square with our knowledge of this fleet. We think that this data, which has been presented by the interim program, needs to be verified.

We consulted with the scientists. Fortunately, this fleet has a long history of observer coverage. Government people have been aboard our vessels over the years, and we checked with the scientists who had been on board. Their observations are summarized in my testimony, and they square with our experience. It would typically take several years before one of our vessels would kill a single marine mammal. So something appears to be wrong with the information that is coming out of this interim program.

Now, that is not to say that something shouldn't be done about our fishery and about our fleet. There may be a problem, but this interim program is not getting at it. We need to be able to sit down with the government scientists and look at their information. We are willing to share our experience and find out whether, in fact, we are a real problem. But if we continue to generate reams of paper and do nothing else, we are off the mark. Thank you, Mr. Chairman.

[The prepared statement of Mr. Gutting may be found at the end of the hearing.]

Mr. STUDDS. Thank you, sir. We have requested some of the information to which you allude from NMFS, and we don't want that to be incorrect information. Are you listening? I think they heard you. Obviously, all these problems originated in the preceding Administration and will rapidly be resolved.

Mr. GUTTING. Yes, sir.

Mr. STUDDS. Dr. Read, I understand that you are familiar with the use of so-called pingers to deter marine mammals from approaching fishing gear. We have heard some concerns expressed recently that those things should not be relied on as the solution to all of our marine mammal gear interactions, particularly since we really don't know what the effects might be of the widespread use of pingers. Can you explain to us how they work and give us your thoughts on their use and tell us whether you think NMFS should be considering a general environmental assessment on the effects of these devices on the marine environment?

Mr. READ. Certainly. Pingers work by—basically they are active acoustic deterrents. They generate a sound that, in principle, is to alert marine mammals to the presence of a net. In the past, pingers have not been shown to be particularly useful in reducing entanglement rates particularly with the animals that I work on, dolphins and porpoises. There are good reasons for that. In order for a pinger to be effective, an animal must know that the sound of the pinger represents a danger to it. And, unfortunately, most entanglements of dolphins and porpoises in nets, at least the kind of nets that I work with, gill and drift nets, usually end up in the death of the animal so it has no opportunity to learn from its experience.

There are other possible problems. Animals can habituate to the sounds. They can associate the sounds with a food source if they are feeding on fish in the nets or around the nets like some seals do. And there are practical problems like changing batteries, cost, design. So I guess, in general, they haven't been shown to be very useful. If we could develop a pinger system that was useful, then I think we would want to be concerned about the effects on both the animals that we are trying to keep out of nets and other nontarget populations of marine mammals.

In the Gulf of Maine, for example, if we were using pingers to try and reduce the entanglement of harbor porpoises in gill nets, we might also want to investigate what the effects of those sounds were on other marine mammals like right whales and whether or not we were having an effect of reducing the effective habitat that animals could utilize. But I would say that the research that I have seen so far doesn't suggest that we are very close to having pingers that are very effective at least for small citations or for pinnipeds.

Mr. STUDDS. Was the theory that this particular noise would be uniquely alarming to the critters, or was it just that any noise might be?

Mr. READ. There are a couple of different lines of work that way. Some people have tried using sounds that are associated with predators of certain marine mammals like killer whale sounds. Sometimes people have just used broadband sounds.

Mr. STUDDS. How about the Senate in debate? Has that been tried?

Mr. READ. No. That is probably worth a try though.

Mr. STUDDS. Ms. Young, we have been told that the NMFS proposal to begin using current carrying capacity instead of historic carrying capacity as a goal for determining stock status is a matter of some concern to the environmental community. Can you explain

the difference, and if it is a problem, can you suggest some alternatives?

Ms. YOUNG. Carrying capacity is always a difficult issue in general. It is debated hotly with terrestrial mammals; for example, deer. Trying to determine what constitutes the carrying capacity is very difficult even with land mammals where you can make good assessments of habitat effects and can get accurate population census and know a lot about reproductive rates. In the marine environment, determining carrying capacity is very difficult, in general, because we don't know a lot of the interactions in the environment. It is more difficult to census and animals, and we know much less about reproductive habits because of the difficult environment.

So trying to assess current carrying capacity is extremely difficult, but what we do know is that habitat is degraded, for the most part, over what it was quite sometime ago, and there are a number of cases where you can see very clearly demonstrated the problem with using current carrying capacity. For example, the northern right whale which is one of the most critically endangered of the large whales—with a population of less than 500 individuals remaining. That population has not shown any significant increase in 50 years despite the lack of any directed take of the animals.

Generally it is thought to be an indication of a stable population, if you don't see any increase. With right whales you see a population fluctuating around a mean, and so you could make the case that right whales are at current carrying capacity because we are not seeing any increase. Yet, no serious scientist would ever make that claim because we know that the oceans once held thousands of them. Relying on current carrying capacity may mean accepting levels of marine mammals that are considerably lower than anyone would presume to be possible. Historic carrying capacity is difficult to assess because there hasn't always been a directed fishery. But, in any case, we would hope that historic carrying capacity would be used wherever possible to try to make those determinations.

Mr. STUDDS. Thank you very much. The gentleman from California.

Mr. HAMBURG. Thank you, Mr. Chairman. I am going to be fairly parochial here. I am not—far from an expert on the Marine Mammal Protection Act, but there are a couple of issues that are very hot in my district. I have the northern third of the California coast. There are a couple of issues that have come to my attention, and I would just like to ask members of the panel to address them.

I want to say before I ask those questions that I consider myself someone who is very sensitive to the right of all species to survive and thrive. I do not, you know—killing species of any kind from the smallest critters to the greatest is something that I think we need to avoid at nearly all costs. But we do have problems on the north coast of California with this very tricky word of balance. Usually the way I approach these issues of environmental balance is that we are way out of balance currently, and we need to bring things more back into balance, and we need to take appropriate steps to do so.

But I just want to throw out a couple of things that are happening where I live and just see how you respond to them. The first

has to do with the Klamath River fishery which is a fishery that is used—the in-river fishery used primarily by the Uroc, the Karook and the Hoopa tribe, and that fishery is being seriously depleted by the tendency of sea lions to camp at the mouth of the Klamath River. And I don't know what all the factors are, but apparently the river at the mouth is extremely shallow, and that makes it even easier for the sea lions to make a significant dent in the chinook salmon that are trying to get upriver to spawn.

The tribal groups understand the sensitivity around this issue. They are not out there with rifles shooting sea lions. They are looking for a solution, and I would like to ask if any of you panel members have any ideas about how we might approach a problem like that? No one?

Mr. THORNBURGH. Yes.

Mr. HAMBURG. Mr. Thornburgh.

Mr. THORNBURGH. Yes, sir. I would suggest that—well, first of all, one of my concerns in solving that problem has typically been to focus attention on other fisheries so if Hoopa and Uroc fishermen have an interest in retaining their fisheries, which we all want them to do, there has been a tendency, of course, to try to reduce recreational and commercial fishing elsewhere to assure that fish come in to spawn and also to provide those local people with their fish. So one solution is not to reduce fisheries elsewhere to provide more fish. The solution should be to somehow try to control those mammals.

Now, if the general public can't scare them away because it is against the law, if only commercial fishermen can scare them away, and if the State and Federal Governments are not trying to deter them, then the problem will continue. I am not suggesting that we go in and cull the herd there, but there needs to be a proactive mechanism to try to deter those animals away, and the general public can't even do it.

Mr. HAMBURG. Right. Anyone else who wants to comment on that?

Ms. YOUNG. Yes. Mr. Thornburgh and I are sitting at opposite ends of the table for some reason, I think. I think that oftentimes people look to trying to eliminate the marine mammals as a solution, and the analogy I would like to offer you is your backyard garden and woodchucks. If you have a garden in your backyard and you have a woodchuck eating your produce, shooting the woodchuck will not solve the problem because the resource is still there. It will attract other animals, and you can't go out and shoot every single possible animal that could come in and eat your garden.

The solution is to try to figure out what it is that is attractive about your particular yard and to look at all the possible solutions, only one of which may involve looking at management measures. To go back to the ocean again, what ends up happening is that the only solution that people look at, is that we have to get rid of them, and not really looking at whether there is a reduced number of fish, and, if so, why that is. Or whether the environment—the river mouth through which the fish are migrating has changed. Has it silted in? Is there a problem with a change in the coastline such that the problem is being exacerbated and cannot be changed.

I think you need to look at ecosystem interactions before you point the finger and say, "Well, these guys are the problem," because you can't eliminate the problem as long as the resource is still there. Something else will exploit it.

Mr. HAMBURG. OK. Well, I think that does define two very different approaches to this problem. Let me just go into my second issue, which is the sea otter. The U.S. Fish and Wildlife Service is now considering allowing the range of the sea otter to expand northward into areas that are currently being utilized by the commercial sea urchin industry, and the rationale for allowing the sea otter to expand northward is that in the event of a tanker spill off the coast of California, unless the sea otter population is spread out along the coast, there could be a serious dent in that population and may be some threat to the population. It seems to me that maybe we should look at the safety of the tankers to minimize much further the possibility of that accident rather than allowing the sea otter population to spread to geographic areas that are possibly not even within their original range, but allowing them to do so is a tremendous problem to a pretty important industry, you know, along the coast of my district. Are any of you familiar with this problem of the sea otter expanding its range northward in the USFW plan?

Ms. IUDICELLO. I am not intimately familiar with the Fish and Wildlife Service plan, but I would like to take a crack at your notion of the tanker lanes. Looking at marine mammals, as Sharon said, as the place where you control activity, lead us away oftentimes from the real source of the problem. In looking at the designation of the Monterey Bay Sanctuary, for example, sea otters in tanker lanes were a hot issue, and we found that even though it could be shown and demonstrated that the major potential threat to sea otters in that area was the tanker traffic, there was just tremendous reluctance on the part of agencies who have authority to move such things to take any action.

We argued then and would argue now that the Endangered Species Act does give both NOAA and the Coast Guard and the Fish and Wildlife Service Authority to proceed with whatever negotiations they need to undertake with other countries to move those tanker lanes in a way that they don't pose this threat that looms over all other activity including the activity of the otters and the fishermen and everyone else.

Mr. HAMBURG. Anyone else want to comment on sea otters? Thank you, Mr. Chairman.

Mr. STUDDS. It is unusual. The sea otters just go where you tell them to go and don't go where you don't want them to go.

Mr. HAMBURG. Well, apparently, they have been managed in a certain area around Saint Nicholas Island off the coast, and the Fish and Wildlife Service has a plan to move them northward into a range of the urchin industry.

Mr. STUDDS. By van or how do you plan to——

Mr. HAMBURG. Well, I think——

Mr. STUDDS. It is a most amazing thing.

Mr. HAMBURG. I think what they are doing now is they are restricting them to a certain area, and, you know, there is a lot of debate about what is the natural area of the California sea otter,

but if they would stay put, it would help. But, unfortunately, they don't always want to.

Mr. STUDDS. Post the area. The gentleman from Alaska, the second most sensitive member of the committee.

Mr. YOUNG. I won't open my statement with what I was going to say. The gentleman from California—instead of moving some north, we would like to move some south. In fact, we have a little problem up there, and I know what you are talking about when it comes to the sea urchin and all the shellfish. It has caused some great concerns among some of my constituents up there.

But, Mr. Osterback, I want to thank you for coming down. I would like to ask you some questions primarily for the record, but feel free to answer them any way you would like to do so. Primarily, what have the fishermen in your area done on the marine mammal fisheries issue during the last five years?

Mr. OSTERBACK. Yes, Mr. Chairman. I believe since about 1989 when fishermen in our area got put on the category I list, we came down and had some discussions with different environmental groups and our congressional people down here, and we went back up, and we used our local media or whatever out there. We talked to our fishermen, educated them that there were problems with marine mammals in the area. At that time, it was Steller sea lions. We encouraged people to have as little interaction as possible with the marine mammals. I believe all lethal takes on marine mammals that were not just accidents stopped. We invited observers on our boats to go out and take a look at how our area actually did operate in conjunction with the marine mammals. We have done just about everything we can, I believe, in the last five years to show that there is interaction between our gear types and the marine mammals, but very little, if any, lethal take is done in fishing.

Mr. YOUNG. What are the results? Have you seen or has your group seen a change in the number of species in that area?

Mr. OSTERBACK. Personally, I have seen very little change as far as Steller sea lions in the area that I fish. I fish basically on the Pacific side of the peninsula so there is—and I am a purse seiner so there is very little interaction between my type of gear and harbor seals. I believe the harbor seal population is mainly on the north side of the peninsula, and I haven't really noticed too much change. There the populations are fairly high. I guess the ones that are on the increase would be the sea otter. The pods of sea otters are building quite rapidly out there, and the other population would be killer whales. The population on killer whales either move there from somewhere else or it has increased quite a bit because there is quite a bit of talk around the docks of the amount of killer whales in the area.

And as a matter of fact, I did bring down a little article that came out of the paper on the "City Gets a Whale of a Show with the Petersburg." Maybe if you want to keep it for the record, that is fine. It says on the areas, I guess, in southeast Alaska where they are starting to have a lot of interaction between the killer whales and dolphins and seals and, I guess they are out teaching their young how to hunt marine mammals so maybe that would be a good article for some of you who are not familiar with it.

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Mr. YOUNG. Alvin, if the laws of minion require quotas on takings of marine mammals, how do you think these quotas should be allocated?

Mr. OSTERBACK. Mr. Chairman, when I hear the word quotas, I guess I relate it to caps. This is something that we have been discussing quite a bit here in the meetings that we have had with NMFS and the environmental community and the other fishing folks that have been there. I think when I hear the quotas, to me it goes back to the NMFS proposal of the PBR's. I guess the caps would then start. You would start the ratchet down, and that leads to the zero mortality. To us, it scares us, I think, more than anything—the fishing industry in my area just for the simple reason that anytime you take a fisherman and a marine mammal and you are both pursuing the same critter out in the ocean, that there is going to be interactions, and sooner or later there will be an accident, and a mammal will be taken. So I believe when you talk caps—to me when you are talking caps, you are talking—you are going to ratchet down toward zero mortality, and that is something that on incidental accidental takes is something that I don't think can be achieved, and we are really afraid of that.

Mr. YOUNG. What about the NMFS proposal? Do you think there should be changes? And were you consulted before it was drawn up?

Mr. OSTERBACK. Mr. Chairman, as far as the NMFS proposal, I believe we did submit written testimony on it, and I think as I have stated before, we have been in quite a few meetings with the different folks here. I think that would kind of give you the impression that we are not in agreement with the NMFS proposal. We have some problems with the PBR's and different types of things. Kind of one of the things I believe that personally that I want to see happen is under the NMFS proposal there is no room for a mitigation team that deal with these different marine mammal issues, whether they are critical or noncritical, however you want to put it, but I think that there needs to be a mitigation team in place that deals with the issues on a region-by-region basis, and I don't think that is in there.

Mr. YOUNG. Mr. Chairman, I agree with Mr. Osterback when it comes to the quotas. If you remember, we started this business with the dolphin and the tunas 20 years ago, and we don't have a tuna fleet left anymore so I know the concern that Mr. Osterback has some merit. Thank you, Mr. Chairman. Thank you, Mr. Osterback.

Mr. STUDDS. I thank the gentleman. The gentlewoman from Oregon.

Ms. FURSE. Thank you, Mr. Chairman. Welcome, Mr. Thornburgh. It is always nice to know that in any deliberative body there are at least two Oregonians. I wanted to ask you a question particularly if I may about the seal population in Astoria at the mouth of the Columbia River. Can you speculate whether that population has grown as a result of displacement or dislocation, say, from environmental impact where they might historically have been? In other words, can you give me a reason why you think that population has grown so rapidly, and I have indeed seen that myself—the huge populations there? But is it, do you think, because something

happened somewhere else that moved them in? An old habitat has changed?

Mr. THORNBURGH. No, ma'am, I do not. I think that the populations have always been large there. In my written testimony, I submit evidence that the Indians used to deliberately herd and kill the seals to protect the salmon runs prior to our influence on the runs in the river so they have always been there. They are just heavily protected now, and there are no natural predators or no indigenous people as predators to keep those animals in control. They are growing at 10 or 12 percent per year which means they double about every decade. So with no change in the rate of growth, you can anticipate twice as many around 10 years from now as you are experiencing today.

Ms. FURSE. And to follow up, because of the heavily depleted salmon runs in our Columbia River system, are you then more aware of the effect on the fishery? In other words, if we were to solve the habitat problem for the salmon and increase the runs, could your fisheries survive with that historical population?

Mr. THORNBURGH. Of salmon? Yes, ma'am.

Ms. FURSE. Thank you. Thank you, Mr. Chairman.

Mr. STUDDS. The gentleman from New Jersey.

Mr. SAXTON. Thank you, Mr. Chairman. I would like to address a question first to Mr. Gutting, and then anyone else who may want to respond to it certainly is welcome to. It seems that throughout your testimony, at least from what I have been able to read and from what little I have heard here—I am sorry for being late—that one of the primary problems here has to do with good information about kills, what the situation really and accurately is, and I understand that there is going to be a proposal set forth by the fishermen together with the environmental community which you have discussed at some length. But just for the record, could you tell us what the main components of that proposal—what you think it might be?

Mr. GUTTING. I am sure if I misspeak that there are experts at the table who will correct me. Our group sincerely believes that all of our efforts—government, industry, the environmental community—ought to be focused on hot spots—real problems, that we shouldn't just mindlessly collect information, put it in computers, and have them spit out statistical reports. We need to identify hot spots, and that is a key element of agreement.

I think there is another key element of agreement, and that is once we identify these hot spots, rather than having formal rulemaking where you submit your comments and you never know whether anybody even reads it or testified to some agency person at length and he just sits there and looks at you and you don't know whether he is hearing you, rather than that kind of thing, which we have had for five years, we ought to form mitigation teams or groups—you call them whatever you want—and be sure that on that group, that team, are all the experts—people from the industry, from the government, people from the scientific community, and problem solve—develop a plan to solve a particular problem; get the right people involved; have that interaction, and then come back to the government and say, "Here is our solution to this hot spot."

It is sort of like fishery management planning in a way. It is looking at each particular problem with an open mind and with a flexibility, a whole list of possible tools, and coming up with a solution. Don't impose across-the-board numbers, across-the-board solutions, all fisheries, all areas. Let us get down to the nitty-gritty and look at real problems, and I think we all agree on that. Obviously, there are a lot of details, and we still have a lot more to discuss. But that is our basic strategy.

Mr. SAXTON. In terms of collection of data and relying on the industry to be a major player in that collection, I think it is fair to say that there are some weaknesses in the system or lack of a system that currently exists. What, in your opinion, do we need to do to ensure that we are getting accurate data to form the basis of whatever plan we come up with?

Mr. GUTTING. I think one thing that needs to be done and I hope will happen the next few weeks is the government should share its data with us—the raw material. Let our skippers go over it and see whether or not there are some glaring errors, things like reporting a Steller sea lion in the Atlantic Ocean. Now, that is just wrong. See whether we can verify it by giving us a chance to look at it. The other thing that we feel strongly about is when you suspect that there is a problem, the government should put some observers on the vessels, and our organization has strongly urged that funds be set aside so we can get observers out there to document the problem, and then the third element is those observers coming back and sitting down with interested parties and going over that information. So it is a combination of things. The key element though is an open communication between the government and the interested parties.

Mr. SAXTON. Let me just follow up on the last sentence and that is open communication. Is there a problem with communication? Are you having problems currently getting access to data?

Mr. GUTTING. We have made requests, and they haven't been responded to. I don't want to say there is a problem. I just hope that it is an instance of them having some difficulty bringing all the information together. We, obviously, have the Freedom of Information Act that we can rely on. We hate to have to go through those formal processes. What we really want to do is sit down with the scientists and dialog. We don't really have an ongoing mechanism to do this.

Mr. SAXTON. Well, NMFS has been relatively cooperative with me and with my staff, and so if you are having problems getting data, I hope that you will let us know and maybe we can help. Secondly, you mentioned something else that I thought was of interest, and that had to do with observers. You are talking, obviously, about an official observer?

Mr. GUTTING. Yes.

Mr. SAXTON. Someone from NMFS. Someone from——

Mr. GUTTING. Or it could be under contract with the NMFS, such as a university. Someone who is official, as it were.

Mr. SAXTON. I think that is a great idea, and one of the things that we always have to deal with then is someone on the Appropriations Committee comes over and says, "Well, you have got this wonderful idea. How are we going to pay for it?" Do you have any

ideas about how we might look at paying for the additional cost of these kinds of programs which I think are good ideas?

Mr. GUTTING. There are thousands and thousands of vessels so, obviously, you can't observe every vessel. I think the key here is prioritizing and identifying certain areas and so you don't waste your money by putting observers out where they are not needed. The easiest way of saving money is setting priorities and targeting your resources. There are currently resources in the National Marine Fisheries Service. There are observer programs. So some of the resources are already there. We believe on the East Coast that moneys were set in the budget for observer programs. The current Administration—excuse me, Mr. Chairman—it is the current Administration, is asking that these moneys be taken out of the budget, and we object to that. We believe that if we maintain the current level and prioritize better, we might be able to meet most of our needs.

Mr. SAXTON. Thank you, Mr. Chairman, and thank you, Mr. Gutting. If I have time——

Mr. LEAPE. I would just like to add on to Mr. Gutting's response. First of all, we welcome his willingness to accept more observers on their boats, but we have an alternative suggestion for how to pay for them. We feel that in these days of declining Federal dollars they need to be spent more effectively. We feel that the most effective use of Federal funds is for biological assessment and technological research and development. Therefore, we feel that the fisheries should pay more of the costs of observers through fees and other mechanisms that I have set out in my statement and would encourage this committee as they go forward to take a look at those because we too believe that we need to see increased observer coverage and less reliance on logbooks to determine the data out there. Thank you.

Mr. SAXTON. Thank you.

Mr. STUDDS. I thank the gentleman. Well, obviously, we have our work cut out for us. We have the ultimate deadline of September 30, and we have to have a draft bill soon, and to the extent that you can all help us reach consensus, the procedure will be a good deal less contentious. We will have to have one more hearing, obviously, after we introduce a bill. Between now and that time, to the extent to which any of you can participate in forging further consensuses or consensi—whatever it is, it would be very much appreciated because we don't like contentiousness. I thank you all very much, especially those of you who have traveled from a long way, and the subcommittee stands adjourned.

[Whereupon, at 11:46 a.m., the subcommittee was adjourned, and the following was submitted for the record:]

ONE HUNDRED THIRD CONGRESS

GERRY E STUDDS MASSACHUSETTS CHAIRMAN

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U.S. House of Representatives
Committee on
Merchant Marine and Fisheries
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April 13, 1993

BACKGROUND MEMORANDUM

TO: Members, Subcommittee on Environment and Natural Resources

FROM: Subcommittee Staff

SUBJECT: Hearing on the Reauthorization of the Marine Mammal Protection Act - Management Procedures for Interactions Between Marine Mammals and Commercial Fisheries

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On Tuesday, April 20, the Subcommittee on Environment and Natural Resources will conduct a hearing on the reauthorization of the Marine Mammal Protection Act (MMPA). The hearing will begin at 10:00 a.m. in room 1334 of the Longworth House Office Building. Testifying are representatives from the National Ocean and Atmospheric Administration, Marine Mammal Commission, environmental groups, the commercial fishing industry, and the scientific community.

The purpose of the hearing is to review testimony on new proposed management procedures for interactions between commercial fisheries and marine mammals in U.S. waters, with a view toward minimizing incidental takes of marine mammals while maintaining the economic viability of U.S. fisheries.

Background

The MMPA was enacted in 1972 for the purpose of ensuring that marine mammals are maintained at, or in some cases restored to, healthy population levels. In passing the Act, Congress responded to a growing concern about the decline of certain species and recognized the important role that marine mammals play in the ecosystem as well as their economic, recreational, and esthetic value.

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Jurisdiction over marine mammals under the MMPA is divided between the U.S. Fish and Wildlife Service -- which has responsibility for sea otters, polar bears, manatees, dugongs, and walrus -- and the National Marine Fisheries Service (NMFS), which has responsibility for all other marine mammals.

Three terms defined in the MMPA play an important role in its history and in managing interactions between commercial fisheries and marine mammals: (1) optimum sustainable population (OSP), (2) depleted, and (3) take. The Act defines OSP as "the number of animals which will result in the maximum productivity of the population or the species, given the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element." Any stock whose population status is less than OSP is depleted. Depleted stocks may also be listed as threatened or endangered under the Endangered Species Act, if their population status indicates that they are in danger of extinction. To take a marine mammal means to harass, hunt, capture, or kill it; or attempt to harass, hunt, capture, or kill it.

As originally written, the MMPA established a moratorium on taking or importing marine mammals except for certain activities regulated and permitted under the Act. These activities include scientific research, public display, and the incidental take of marine mammals in the course of commercial fishing operations. Prior to 1988, the Act authorized the take of marine mammals incidental to commercial fishing operations through two mechanisms: (1) the issuance of "general permits" for the take of relatively large numbers of marine mammals by both U.S. and foreign fishermen; and (2) "small take exemptions" for U.S. fishermen only.

General permits could be issued provided that (1) the takings were from a non-depleted marine mammal stock; (2) such takings would not disadvantage the stocks involved; and (3) issuance of the permit was consistent with the purposes and policies of the MMPA. Small take exemptions could be granted if (1) it was determined that the total authorized taking would have a negligible impact on the stock; and (2) the appropriate agencies provided guidelines pertaining to the establishment of a cooperative system among fishermen to monitor and report such taking.

In 1986, the Japan Salmon Fisheries Association requested a general permit which eventually served to change the entire course of the MMPA incidental take allowances. The permit request was to take Dall's porpoise, northern fur seals, and sea lions over a 5-year period in course of the Japanese Bering Sea salmon gillnet fishery. In response to the request, the National Marine Fisheries Service (NMFS) issued a permit for the taking of Dall's porpoises over a 3-year period, but denied a permit to take northern fur seals and sea lions because insufficient information existed to determine the population status of those

two species. In 1987 Alaska's Kokechik Fisherman's Association and environmental organizations challenged the Dall's porpoise permit, contending that the other two species would inevitably be taken in the fishery. The U.S. District Court ruled in favor of the plaintiffs, invalidating the permit. This now-famous "Kokechik decision" (1) effectively negated NMFS' ability to issue any incidental take permits for non-depleted species in situations where takes of depleted species or animals from stocks of unknown status might also occur, and (2) more importantly, stipulated that marine mammal stocks whose optimum sustainable population has not been determined are to be considered depleted.

1988 Amendments

Following the Kokechik decision, quick Congressional action was required to allow domestic fishing operations to continue until a more effective means of managing interactions between fisheries and marine mammals could be determined. At the same time, Congress intended to retain the general goal of the MMPA that the incidental kill or serious injury of marine mammals during commercial fishing operations should be reduced to insignificant levels approaching a zero mortality and serious injury rate.

The 1988 amendments to the MMPA established a five-year interim exemption from the Act's prohibition on taking marine mammals incidental to U.S. commercial fishery operations other than yellowfin tuna fishing (commercial yellowfin tuna operations are now managed separately, through the International Dolphin Conservation Act enacted in 1992). NMFS was directed to use the five-year period to collect data on marine mammal stocks and the extent of commercial fishery interactions with those stocks, and to develop -- in consultation with the Marine Mammal Commission, Regional Fishery Management Councils, and other interested parties -- a proposed regime to govern interactions between commercial fishing operations and marine mammals after the exemption expires on October 1, 1993. The amendments required NMFS to submit a final proposal to Congress by January 1, 1992.

During the interim exemption period, NMFS developed three fishery classifications based on their level of interactions with marine mammals. Category I fisheries are those in which it is highly likely that one marine mammal will be taken by a randomly selected vessel during a 20-day period. Category II fisheries have some likelihood of taking one marine mammal during a 20-day period, and Category III fisheries are those in which it is highly unlikely that any marine mammal will be taken during a 20-day period.

The interim exemption program required vessel owners to register each vessel operating in a Category I or II fishery and to maintain daily logs of fishing effort and incidental takes of marine mammals. NMFS was also required by Congress to place observers on 20-35% of the vessels in Category I.

NMFS Report

In June 1991, NMFS issued a Draft Legislative Environmental Impact Statement on a Proposed Regime to Govern Interactions Between Marine Mammals and Commercial Fishing Operations. Following opportunity for public comment, a final report was issued in November of 1992.

The goal of the proposal is to have all marine mammal stocks reach their optimum sustainable population (OSP). NMFS proposes that incidental take quotas be determined based on the concept of "Potential Biological Removal" (PBR): the potential removals from a stock at OSP that could be allowed without disadvantaging the stock. PBRs will be calculated for each marine mammal stock based on available data, and will take all potential removals into account, including incidental takes from commercial domestic and foreign fisheries, captures for public display, and subsistence hunts. PBRs will then be allocated among user groups.

NMFS proposes that the allocation of PBRs among the various components of the fishing industry should be patterned after the basic procedures provided for allocation of fishery stocks by the Regional Fishery Management Councils under the Magnuson Act. Allocations will be made for all Category I and II fisheries interacting with marine mammal stocks that are depleted, or for which the estimated level of removals is greater than the PBR. Allocations will be based on socio-economic factors, biological considerations, historical take rates, past performance to reduce takes, and ability to reduce takes.

At a certain level of take, a fishery will be required to adopt management measures to prevent the allocation from being exceeded. If or when allocation levels are exceeded, NMFS proposes a variety of possible actions, including (1) the authority to revoke existing permits or deny new applications; (2) reductions in fishing seasons; or (3) gear, area, or time of day restrictions.

Reaction and Other Proposals

Reaction to the NMFS proposal from the fishing industry and the scientific and environmental communities has been mixed.

The environmental community has questioned NMFS' ability to enforce removals and raised questions regarding public participation in the various allocation and stock assessment processes. Some environmental and animal welfare groups believe the proposal moves away from the zero mortality rate goal of the MMPA.

While commercial fishermen have expressed concerns about how marine mammal takes would be allocated, non-fishery user groups -- such as Native populations and the public display industry -- are concerned about the impacts of PBR allocations on their needs.

To date, no long-term management alternatives to the PBR-based regime have been suggested. Some portions of the fishing industry have proposed a continuation of the current exemption program.

Issues

1. NMFS has estimated that the cost of the new program will be approximately $19 million annually for research into stock assessments, fishery observers, enforcement and data analysis. Given current budget restrictions, is the funding available to support such a program? Should user fees be established to pay for observers and other costs?

2. A number of the marine mammals stocks for which PBRs will be determined are highly migratory. Takes may occur in Canadian, Caribbean, or Latin American waters. Will we be penalizing U.S. fishermen by first determining the level of non-U.S. removals and then establishing allocations for U.S. fishermen based on the remaining potential removal?

3. Is it practical or appropriate to assign the PBR allocation process to the Regional Fishery Management Councils?

4. How will removals be monitored and enforced?

5. Are alternatives to the NMFS proposal available? If so, what are they?

STATEMENT OF
DIANA H. JOSEPHSON
DEPUTY UNDER SECRETARY FOR OCEANS AND ATMOSPHERE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
DEPARTMENT OF COMMERCE

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES
COMMITTEE ON MERCHANT MARINE AND FISHERIES

HOUSE OF REPRESENTATIVES

APRIL 20, 1993

Mr. Chairman and Members of the Subcommittee:

I am Diana H. Josephson, Deputy Under Secretary for Oceans and Atmosphere, U.S. Department of Commerce. I appreciate this opportunity to present the Department's views regarding a long-term regime to govern marine mammals and commercial fishing under the Marine Mammal Protection Act (MMPA).

Since its enactment the MMPA has been an important element in the conservation of our Nation's Living Marine Resources. The MMPA recognizes that marine mammals are important elements of marine ecosystems and resources of great aesthetic, recreational. and economic significance. The MMPA also established a comprehensive program for marine mammal conservation, which includes maintaining populations within Optimum Sustainable Population (OSP) levels. The MMPA has been a key factor in the conservation of several populations. For example, the numbers of porpoise killed incidental to tuna purse-seine fishing in the eastern tropical Pacific Ocean has been reduced substantially.

Seal and sea lion populations along the west and northeast coasts are increasing. The eastern North Pacific stock of gray whale has recovered sufficiently that it no longer requires the additional protection of the Endangered Species Act (ESA).

STATUS OF MARINE MAMMAL STOCKS

The status of most population stocks of marine mammals relative to their OSP levels remains unknown. Sixty populations of marine mammals listed in NMFS' legislative proposal for governing interactions between marine mammals and commercial fishing operations are under NMFS jurisdiction. Of these 60 populations, 4 are within OSP levels and 10 are depleted -- 2 of which are threatened and 7 of which are endangered. The status of the other 46 populations is unknown. The status of 4 species of marine mammals, which have special significance under NMFS' proposed regime, are discussed in detail below.

Steller (Northern) sea lions are classified as threatened under the ESA and occur in coastal waters of the North Pacific Ocean from California to Japan. The species has declined 73 percent throughout its range in just the last 20 years, and is now well below its optimum level.

The number of adults and juveniles in U.S. waters dropped from 154,000 in 1960 to 42,000 in 1990. Most of this decline occurred in Alaskan waters between Kenai and Kiska, where sea

lion counts declined from 105,289 in 1959 to 20,000 in 1991. The decline in Alaska is believed to be due to a combination of incidental kills in fisheries, illegal shooting, changes in the numbers and/or quality of prey, and possibly other unidentified factors. The Steller sea lion population off Washington and Oregon is low but has stabilized at approximately 3,000 animals. In California, however, they have slowly declined since the 1950's to about 2,000 animals.

Harbor porpoise along the Atlantic coast are found from Newfoundland to Florida. It is hypothesized that there are three populations: Newfoundland, Gulf of St. Lawrence, and Gulf of Maine/Bay of Fundy. However, there is not enough evidence to test this hypothesis against the alternative of a single population. Little is known about the seasonal movements of this species except for the presence of summer aggregations in the Gulf of Maine, Gulf of St. Lawrence and the east coast of Newfoundland.

The 1991 estimate of the Gulf of Maine population is 45,000 (95 percent Confidence Interval (CI): 19,000-80,000). No useful estimates of abundance for the other populations exist. The best estimates of bycatch by the U.S. Gulf of Maine sink gillnet fishery in 1990 and 1991 were 2,400 (95 percent CI: 1,600-3,500) and 1,700 (95 percent CI: 1,100-2,500). These estimates do not include bycatch from fisheries south of Cape Cod or north of the

U.S. border. The estimated bycatch of the other two populations is largely unknown, though some data do exist. Because this level of bycatch has been determined as unsustainable, on January 7, 1993 NMFS proposed listing harbor porpoise in the Gulf of Maine as threatened under the ESA.

Two species of **pilot whales** occur in the North Atlantic, the short-finned pilot whale in the south and the long-finned in the north. The two species overlap seasonally in the Mid-Atlantic region of the western North Atlantic. The long-finned pilot whale occurs northward into Canadian and Greenland waters, and eastward to Europe; this species is the subject of an ongoing harvest around the Faroe Islands and incidental capture in several fisheries in U.S. and Canadian waters.

The short-finned pilot whale may be subject to a low level of bycatch in several U.S. fisheries. Little is known of the population structure and general life history of both species. There are estimated to be 75,000 long-finned pilot whales in the eastern North Atlantic and 11,000 in the continental shelf region of the western North Atlantic. The estimate for the western North Atlantic is more than 10 years old and is imprecise. Ongoing surveys will update the western North Atlantic early in 1994.

Still listed as endangered under the ESA are the two stocks of **North Pacific gray whales**. The eastern North Pacific (or "California") stock was heavily exploited by whalers in the last half of the 19th century. The present stock size (21,113) is approximately equal to the size of the 1846 population (15,000 to 20,000). Population growth rate is 3.2 percent per year despite a subsistence catch of 167 whales per year in the Russian Federation. In light of this recovery, the Secretary of Commerce has recommended that the stock be removed from the ESA's list of endangered and threatened wildlife. The Western Pacific stock of gray whales remains endangered.

1988 AMENDMENTS TO THE MARINE MAMMAL PROTECTION ACT

The 1988 amendments to the MMPA included section 114, which allowed an interim exemption to the moratorium on the taking of marine mammals incidental to commercial fishing operations through September 30, 1993. The interim exemption resulted from an agreement between the environmental community and the fishing industry and allowed commercial fishing to continue while NMFS gathered needed information on the extent of interactions between commercial fishing operations and marine mammals. This information is necessary to assess the impact of commercial fishing operations on marine mammal stocks.

Section 114 directs NMFS to develop a regime to govern interactions between marine mammals and commercial fishing operations after September 30, 1993. The regime would provide adequate protection for marine mammals while allowing a limited number of marine mammals to be taken incidental to fishing activities. The regime would also have to include the ability to collect additional data and incorporate these data into future decisions. A successful regime would:

(1) Focus resources on those marine mammals stocks most affected by interactions with commercial fishing operations.

(2) Assess the status of marine mammal stocks and monitor the number of marine mammals removed in commercial fishing operations.

(3) Consider all human-related sources of mortality or injury to assess the impact on marine mammal populations of their interactions with commercial fishing operations.

(4) Address the requirements of the ESA and other legislation related to the conservation and management of marine resources.

(5) Develop and implement management actions or technology designed to reduce incidental mortality of marine mammals in commercial fishing operations.

(6) Provide for long-term monitoring of marine mammal stocks to ensure their recovery to, or maintenance within, OSP.

The regime developed by NMFS incorporates all of these elements. It is based on guidelines submitted to NMFS by the Marine Mammal Commission and was developed in consultation with the U.S. Fish and Wildlife Service, representatives of the fishing industry, conservation groups, and other interested members of the public. The regime proposes a dynamic process that would use information gathered during the Interim Exemption period and govern the interactions between marine mammals and future commercial fishing operations. The regime would maintain stocks of marine mammals within, or promote recovery to, OSP, while placing the minimum restrictions necessary on fishing operations.

INTERIM EXEMPTION, 1988-1993

A List of Fisheries categorizing U.S. fisheries according to their historic and inferred take of marine mammals incidental to fishing operations was published in 1989. Vessel owners operating in fisheries that regularly take marine mammals were required to register with NMFS and submit logbooks with detailed information on daily fishing effort, areas of fishing, and the nature and extent of all marine mammal interactions. Data were entered into a data management system capable of storing and analyzing data, as well as producing detailed reports. More than 15,000 vessels were registered for the exemption program in the first full year, 12,000 in 1991, and 11,000 in 1992; more than 5,700 have registered so far in 1993. In 1990 and 1991,

approximately 74 percent of registered fishermen submitted logbooks and renewed their exemption certificates.

Observers placed by NMFS aboard fishing vessels provided additional information on fishing effort, incidental takes of marine mammals, and other details about fishing operations such as time of day, depth and length of nets, and soak times. These details enhance our understanding of why and how marine mammals are taken so that methods can be developed for reducing incidental takes.

Observer data confirmed that numerous marine mammals were in fact being taken during the operations of most Category I fisheries, those with frequent removal of marine mammals. However, at least three Category I fisheries, or specific segments of these fisheries, were determined to have a minimal impact on marine mammal populations and were subsequently reclassified.

In 1990, the verification of logbooks from eight Category I fisheries indicated that approximately 80 percent of fishing days in observer records were also reported by vessel owners. Mortality of marine mammals reported by vessel owners ranged from 40 to more than 100 percent of that reported by observers. When owner logbooks reported more deaths of marine mammals than

observer records, both sets of records were examined to determine the source of the discrepancy.

NMFS initiated research to assess marine mammal population stocks in fiscal year 1991. From 1991 to 1993, NMFS funded 26 research projects. Research objectives for 17 of these projects were to provide or refine estimates of minimum abundance for those marine mammal stocks that interact with commercial fishing in U.S. waters. The other 9 projects were conducted to augment minimum abundance estimates in determining the impact of fishery-related mortality on marine mammal populations or to investigate methods for reducing the number of mortalities.

REPLACING THE INTERIM EXEMPTION

Our most pressing challenge under the MMPA is replacing the interim exemption program with a management regime that would provide for the conservation of all marine mammal stocks, while allowing for the continued use of our Nation's important fishery resources. NMFS has prepared a proposal to fulfill this objective. This plan would (1) allow marine mammal stocks to equilibrate within their OSP, (2) allow commercial fishing to continue, (3) focus agency resources on marine mammal stocks affected most by commercial fishing, (4) allow takings from some, but not all, depleted, threatened, and endangered stocks, (5) monitor fishing operations to ensure that removals of marine mammals remain within specified limits, (6) assess the status of

all marine mammal populations with respect to OSP, and (7) reduce mortality of marine mammals incidental to commercial fishing operations. The two most important steps required for the successful implementation of the proposed regime are to determine how many marine mammals may be removed from a population stock without disadvantaging that stock and to monitor the number of incidental removals from populations.

Scope of the Plan

NMFS' "Proposed Regime to Govern Interactions Between Marine Mammals and Commercial Fishing Operations," submitted to Congress in November 1992, would apply to all commercial fishing operations under U.S. jurisdiction, with the exception of the yellowfin tuna purse seine fishery in the eastern tropical Pacific Ocean. Although the proposal would apply only to commercial fishing, removals from all sources must be considered. The impact of fishery-related removals of marine mammals cannot be evaluated and managed properly unless done in concert with removals from all other sources of human-related mortality or serious injury. Therefore, the allocation of authorized removals should include removals due to all human-related sources. Thus, the authorizations for taking marine mammals incidental to fishing operations would consider the number of marine mammals removed by other human activities in the marine environment, such as subsistence harvest and vessel traffic.

Focus Research and Management Efforts

NMFS will use information collected during the Interim Exemption to focus research and management activities under the new regime where they are most needed. As additional data are accumulated, these will be used to revise our research and management direction. The status of each marine mammal stock will be assessed, and the populations in the most trouble will receive highest priority for additional research efforts. Management and monitoring efforts will be concentrated on those fisheries that interact with these populations of marine mammals at levels that have the potential to result in significant adverse impacts to the populations.

Potential Biological Removals

The proposal would provide the framework for calculating the total number of animals that may be removed from marine mammal populations while allowing the stock to remain within, or recover to, OSP. This number is the Potential Biological Removal (PBR). Using data collected during the Interim Exemption period, NMFS would prepare Stock Assessment Reports for each stock of marine mammal that interacts with commercial fishing operations in U.S waters. These reports would contain information concerning the abundance, growth rate, status with respect to OSP, and future research needs for stocks of marine mammals. This information would be used to calculate a PBR for each stock of marine mammal that interacts with commercial fisheries.

When population growth rates can be estimated, NMFS would calculate PBR as the product of abundance and observed population growth rate. Where necessary information is unknown or of poor quality, NMFS would use conservative default values for population growth rates to calculate PBR. PBR calculations for stocks that are determined to be below OSP levels, or for which the status is unknown, would include a recovery factor. This recovery factor would reduce PBR for the affected stocks so that a portion of the net annual production would be protected, thus enhancing the recovery of depleted stocks.

PBR values would be examined for each stock and, where necessary, reduced to minimize the impacts of commercial fishing on the recovery of depleted stocks. For example, when the estimate of minimum abundance is very low, such as with northern right whales, PBR could be reduced to zero. The PBR for declining populations would also be examined carefully during the adjustment process to determine the need for reduction of PBR.

Allocating PBR

Calculated and adjusted PBRs would be allocated among fisheries and other groups that may remove marine mammals from populations. Other potential uses of marine mammals include scientific research, public display, and activities in marine environments other than commercial fishing. When making PBR allocations for these purposes, as well as commercial fishing,

NMFS would have to consider subsistence harvests where appropriate so removals due to all such activities do not exceed PBR.

Following calculation and adjustment of PBR for each stock of marine mammals, as well as public and scientific review of the calculated values, NMFS would draft a plan to allocate a portion of PBR for marine mammal stocks to commercial fisheries. The plan would be developed in conjunction with other Federal and state agencies and Fishery Management Councils. The Councils would hold public hearings, solicit public comments, and submit recommended changes to NMFS.

Stock Assessment Research

The regime includes stock assessment research to determine the status of all marine mammal populations with respect to OSP. Eventually estimates of population growth derived from research data would replace default values of population growth for calculating potential removals from all stocks of marine mammals. NMFS would draft a long-term research plan to continue assessments of marine mammal stocks to update Stock Assessment Reports. The research plan and annual reports describing research activities for the preceding year would be made available for public review.

NMFS would develop methods to assess the status of marine mammal populations on a long-term basis. Long-term monitoring of populations is needed to ensure that marine mammals remain within OSP or continue their recovery.

Monitoring Removals

Under the proposal, NMFS would have the authority to place observers on vessels in any commercial fishery operating in U.S. waters, whether the vessel is operating in a fishery that has a history of interaction with marine mammals or in one of the fisheries designated as "non-takers." Observer coverage would be greatest in fisheries with significant interactions with depleted or potentially declining stocks; priorities for observer coverage would decrease for fisheries as their level of interaction, and the status of interacting marine mammals, decreased. Fishermen in those fisheries not subject to observer coverage would be required to maintain information concerning fishing effort and interactions with marine mammals and to submit this information to NMFS. The fishermen's records would be used to augment observer coverage as a means to monitor interactions with marine mammals.

Depleted, Threatened, and Endangered Species

The proposal contains provisions to authorize the taking of depleted marine mammals, including those listed as threatened or endangered under the ESA. Procedures for this authorization

would adhere to requirements of section 7 of the ESA when appropriate and section 101(a)(5) of the MMPA. The plan would allow removals from depleted stocks to be authorized in the absence of a conservation or recovery plan for an interim period, not to exceed 240 days.

Intentional Takes

The Interim Exemption allows commercial fishermen to use intentional non-lethal measures to deter marine mammals from damaging their gear or catch or to provide for personal safety. The lethal taking of non-depleted pinnipeds is also authorized if non-lethal measures prove ineffective.

The non-lethal taking of marine mammals would also be allowed under the proposed regime for reasons similar to those under the Interim Exemption. The proposed regime also would authorize intentional lethal taking of some marine mammals for personal safety or if fishermen can demonstrate that marine mammals cause a significant negative impact on the fishery and non-lethal measures were tried and proven to be ineffective. Lethal removals would be allowed only if they were within the allocated PBR. As is currently the case in the MMPA, intentional lethal taking of cetaceans or depleted pinnipeds would not be allowed. The proposed regime would not allow the intentional

taking, non-lethal or lethal, of threatened or endangered species of marine mammals.

Zero Mortality Rate Goal

The proposed regime contains provisions to reduce taking of marine mammals incidental to commercial fishing operations, consistent with section 101(a)(2) of the MMPA and the recommendations of the Marine Mammal Commission to reduce mortality and serious injury to insignificant levels approaching a rate of zero. Under the proposed regime, the major objective of research efforts would eventually shift from assessing populations and determining impact of incidental removals on population status to efforts designed to reduce mortality incidental to fishing operations as our knowledge increases. However, when critical problems are identified, these would be addressed in a timely manner. For example, NMFS is planning a workshop in fiscal year 1993 to identify viable options to reduce mortality of harbor porpoise incidental to commercial fishing in the Gulf of Maine, and we have funded a study to investigate acoustic deterrence of harbor porpoise from gillnets.

In summary, our proposed regime to govern interactions between marine mammals and commercial fishing operation would provide a framework to fulfill the objectives of the MMPA with minimal restriction on commercial fishing operations subject to U.S. jurisdiction. The proposed regime would provide a

comprehensive program to assess the status of marine mammal populations and monitor that status into the future. Removals incidental to commercial fishing operations would be monitored carefully, especially in those fisheries that have the most significant impact on populations of marine mammals. The proposed regime also would include mechanisms to protect those stocks with the most need and would seek to reduce mortality and serious injury to marine mammals incidental to commercial fishing operations.

Thank you Mr. Chairman and Members of the Subcommittee for this opportunity to express the views of the Department. I would be pleased to answer any questions you or other Members may have.

STATEMENT OF
ROBERT J. HOFMAN, Ph.D.
SCIENTIFIC PROGRAM DIRECTOR
MARINE MAMMAL COMMISSION

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES
COMMITTEE ON MERCHANT MARINE AND FISHERIES

HOUSE OF REPRESENTATIVES

APRIL 20, 1993

Mr. Chairman and Members of the Subcommittee:

I am Robert Hofman, Scientific Program Director of the Marine Mammal Commission. I appreciate this opportunity to present the Marine Mammal Commission's views regarding the system that should be used to govern interactions between marine mammals and commercial fisheries after expiration of the interim, 5-year exemption enacted in 1988.

When the Marine Mammal Protection Act was passed in 1972, it was recognized that marine mammals were taken incidentally in the course of commercial fishing operations, particularly the yellowfin tuna purse seine fishery in the eastern tropical Pacific. It also was recognized that prohibiting such take could impair commercial fisheries and have significant socio-economic impacts. Thus, the Act provided that the Secretaries of the Interior and Commerce could issue permits authorizing incidental taking of non-depleted species and stocks when the taking would not disadvantage them. It also was recognized that, in at least some cases, the incidental take might be avoided or reduced by altering fishing gear or practices. Thus, one of the goals of the Act is to reduce the incidental kill and serious injury of marine mammals permitted in the course of commercial fishing operations to as near zero as practicable.

During Marine Mammal Protection Act reauthorization hearings held in 1981, representatives of the U.S. fishing industry noted that many fisheries caught only small, biologically insignificant numbers of marine mammals and that it was burdensome to require fishermen involved in those fisheries to go through the same permitting procedures necessary to ensure that fisheries taking large numbers of marine mammals do not disadvantage the affected species or population stock. This made sense and the Act was amended in 1981 to allow the Secretary to authorize the unintentional taking of small numbers of non-depleted marine mammals incidental to commercial fishing operations when, after notice and opportunity for public comment, the Secretary finds

that the total of such taking will have a negligible impact on the affected species or population stock, and provides guidelines for establishment, by the involved fishermen, of a cooperative system for monitoring the taking.

Subsequently a number of studies were undertaken to assess and monitor the numbers of marine mammals being taken incidentally in both U.S. fisheries and fisheries in other parts of the world. These studies indicated that incidental take was more common than had been previously thought and that, in some cases, the take was greater than thought. For example, studies done in the early and mid-1980s indicated that there was a substantial incidental take of harbor porpoise in gillnet fisheries in both California and New England. Other studies indicated that there was a substantial incidental take of several marine mammal and other non-target species in the high seas driftnet fisheries in the North Pacific.

In 1987 a permit issued by the Department of Commerce to the Federation of Japan Salmon Fisheries Cooperative Association authorizing the incidental take of Dall's porpoise in the Japanese North Pacific salmon driftnet fishery was challenged successfully in a lawsuit filed by the Kokechik Fishermen's Association, representing Alaska subsistence fishermen, and several environmental groups. The court found that issuing the single-species permit violated the Marine Mammal Protection Act because other species for which a permit could not be issued (e.g., northern fur seals) would inevitably be caught if the Japanese were allowed to fish as authorized by the permit.

The court's decision overturned a longstanding National Marine Fisheries Service interpretation of the Marine Mammal Protection Act's permit provisions and cast serious doubt on the Service's ability to issue incidental take permits for other fisheries including several domestic fisheries whose permits were to expire at the end of 1988. For some fisheries, there was insufficient information to determine which marine mammal species were likely to be taken incidentally. In other cases, it appeared likely that there were insufficient data to make the required showing that the affected marine mammal species and population stocks were within their optimum sustainable population range and would not be disadvantaged as a result of the incidental taking. In addition, small numbers of depleted species for which incidental take permits could not be issued were known to be taken incidentally in some fisheries.

In response to the uncertainties raised by the Kokechik decision and the growing recognition that incidental take levels were greater in some fisheries than previously thought, representatives of the U.S. fishing industry and environmental community jointly proposed in 1988 that Congress exempt U.S. fishermen from the general permit and "small take" provisions of

the Marine Mammal Protection Act for a period of three years to allow the take of marine mammals incidental to certain commercial fisheries while gathering information needed to make the required determinations. In response, the Marine Mammal Protection Act was amended in 1988 to exempt most U.S. commercial fisheries from the general permit and "small take" provisions of the Act for a period of five years. The period of the exemption was increased from three to five years to provide more time to gather and evaluate necessary information.

The 1988 amendments directed that the National Marine Fisheries Service classify all U.S. fisheries according to the frequency that they take marine mammals. They required that owners of vessels engaged in fisheries that take marine mammals more than rarely must register with the Service and obtain an exemption certificate. They also required that vessel owners report incidental taking and provide such other information as determined necessary by the National Marine Fisheries Service to reliably determine the nature and extent of the incidental take. In addition, the amendments required that the Service develop an observer program to verify the reliability of the data reported by fishermen.

As a first step towards determining the regime that should be used to govern marine mammal-fisheries interactions after the five-year interim exemption expires, the Marine Mammal Commission was directed to develop and make available to the Secretary and to the public recommended guidelines. The amendments specified that the guidelines:

> "(A) be designed to provide a scientific rationale and basis for determining how many marine mammals may be incidentally taken under a regime to be adopted to govern such taking after October 1, 1993;
>
> "(B) be based on sound principles of wildlife management, and be consistent with and in furtherance of the purposes and policies set forth in this Act; and
>
> "(C) to the maximum extent practicable, include as factors to be considered and utilized in determining permissible levels of such taking --
>
> (i) the status and trends of the affected marine mammal population stocks;
>
> (ii) the abundance and annual net recruitment of such stocks;

(iii) the level of confidence in the knowledge of the affected stock; and

(iv) the extent to which incidental taking will likely cause or contribute to their decline or prevent their recovery to optimum sustainable population levels."

The Commission, in consultation with its Committee of Scientific Advisors, developed and, in January 1990, provided draft guidelines to the National Marine Fisheries Service and other interested parties, including fisheries groups and environmental organizations, for review and comment. Final, recommended guidelines were developed taking into account comments on the draft. The recommended guidelines were provided to the National Marine Fisheries Service in July 1990. The Commission also prepared and provided the Service a summary of the substantive comments it received on the draft guidelines and an explanation of how those comments were addressed. These documents were provided to the Committee when they were forwarded to the Service and we can provide additional copies if anyone did not get them.

In its recommended guidelines, the Commission noted the New Principles for the Conservation of Wild Living Resources formulated during two 1975 workshops sponsored by the President's Council on Environmental Quality, the World Wildlife Fund-U.S., the Ecological Society of America, the Smithsonian Institution, and the International Union for the Conservation of Nature and Natural Resources (Holt, S. J. and L. M. Talbot. 1978. New Principles for the Conservation of Wild Living Resources. Wildlife Monographs, No. 59. 33 pp.). Consistent with the new principles, the Commission noted its belief that it would be appropriate in certain cases to allow the incidental taking of depleted as well as non-depleted species and population stocks of marine mammals and that the general objectives of the regime to govern marine mammal-fisheries interactions should be to:

1. maintain the fullest possible range of management options for future generations;

2. restore depleted species and populations of marine mammals to their optimum sustainable level with no significant time delays;

3. reduce the incidental take to as near zero as practicable; and

4. as possible, minimize hardships to commercial fisheries while achieving objectives 1, 2, and 3.

The Commission recommended that the Regime to Govern the Taking of Marine Mammals Incidental to Commercial Fishing after 1 October 1993 --

- reaffirm the Marine Mammal Protection Act's goal of maintaining marine mammal populations within their optimum sustainable population range;

- reaffirm the Act's goal to reduce the incidental kill and serious injury of marine mammals in the course of commercial fishing operations to insignificant levels approaching a zero mortality and serious injury rate;

- reinstate the substantive, although not necessarily the procedural, requirements of the general permit and small take provisions of the Marine Mammal Protection Act for marine mammal populations known or reasonably believed to be within their optimum sustainable population range;

- allow the incidental take of marine mammals listed as endangered or threatened under the Endangered Species Act or depleted under the Marine Mammal Protection Act when: (1) a recovery plan or conservation plan, including an implementation plan, has been developed, adopted, and put in place; (2) the authorized level of take, by itself and in combination with other sources of mortality, is not likely to cause or contribute to a further population decline or cause more than a ten percent increase in the estimated time it will take for the affected species or population to recover to its maximum net productivity level; (3) ongoing and planned monitoring and enforcement programs are adequate to ensure that the authorized levels of take are not exceeded and to detect any unforeseen effects on the size or productivity of the affected species or population; and (4) there is good reason to believe that the incidental take has been or will be reduced to as near zero as practicable;

- authorize, on an experimental basis, for periods of 3-5 years, the incidental take from species and population stocks whose status is uncertain when: (1) the authorized level of incidental take

clearly would have a negligible effect on population size and productivity; and (2) ongoing or planned assessment, monitoring, and enforcement programs are adequate to ensure that the authorized level of take will not be exceeded, the status of the affected species or population stock will be determined with reasonable certainty within 3-5 years, and possible ways to avoid or reduce the level of incidental take will be identified and implemented;

- streamline and continue the vessel registration and reporting programs initiated under the 1988 Marine Mammal Protection Act amendments;

- grant explicit authority to the Secretary of Commerce to place observers aboard any commercial fishing vessel operating in U.S. waters; and

- provide necessary funding or authorize the collection of user fees sufficient for observer and other marine mammal monitoring programs.

The Commission's recommended guidelines assumed that, at the end of the five-year exemption period, sufficient information would be available to accurately estimate the level of incidental take in various fisheries, the status of the affected marine mammal stocks, and the level of take that could be permitted without causing the affected populations to be reduced or maintained below their optimum sustainable population level. When it transmitted the recommended guidelines to the National Marine Fisheries Service, the Commission noted that the assumption would not be valid unless additional population assessments were undertaken promptly by the Service.

The Commission also noted that marine mammals may be affected indirectly as well as directly by commercial fisheries -- e.g., by competition for the same prey species. To address this problem, the Commission recommended that the Service promulgate regulations under the Fishery Conservation and Management Act requiring Fishery Management Councils to assess and take into account the food requirements (and uncertainties related thereto) of marine mammals and other non-target species when calculating the optimal yield of fishery resources. Towards this end, the Commission recommended that the Service organize and hold a workshop or series of workshops to identify and evaluate possible procedures for assessing interactions and ensuring that fisheries do not directly or indirectly disadvantage marine mammal populations. The Commission suggested, among other things, that the workshops consider the establishment of: thresholds below which exploitation of fish stocks should be prohibited; guidelines and procedures for

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addressing uncertainty with respect to the status of and functional relationships among fisheries resources and other components of the marine ecosystem; and research and management programs needed to fill critical gaps in knowledge of the structure and dynamics of marine ecosystems.

The Commission's Recommended Guidelines were used by the National Marine Fisheries Service as the basis for developing its Proposed Regime to Govern Interactions between Marine Mammals and Commercial Fishing Operations. The Service also took into account comments and suggestions provided by other agencies and by the fishing industry and environmental community. The proposal, forwarded to Congress in December 1992, differs in some respects from the Recommended Guidelines provided by the Commission. For example, the Service's proposal would not require that a recovery plan or conservation plan be in place before authorizing take from stocks listed as endangered or threatened under the Endangered Species Act, or depleted under the Marine Mammal Protection Act. Likewise, it would not limit the time period that incidental take could be permitted from species and population stocks whose status is uncertain, before OSP determinations must be made.

Although the Commission has questions as to how certain elements of the Service's proposal would be implemented, it believes that the proposal is both practical and conceptually sound. If accepted and implemented effectively, the proposed regime would benefit fishermen by streamlining the process for obtaining incidental take authorization, and by authorizing take from population stocks whose status is uncertain and from stocks listed as endangered, threatened, or depleted when the taking would not significantly delay recovery of the affected stock. The proposal would benefit marine mammals by reducing the possibility that incidental take in fisheries, by itself and in combination with other sources of non-natural mortality, will cause any species or population stock to be reduced or maintained below its maximum net productivity level, by enforcing compliance with the authorized take level, and by monitoring key parameters of those stocks most likely to be affected by incidental taking in fisheries.

Both fisheries and marine mammals would benefit from the proposed program to identify ways whereby fishing gear and practices might be altered to avoid or reduce incidental taking. Fisheries would benefit by reduction of regulation, by reduction of gear damage caused when marine mammals are caught, and by reduction of the time fishermen must spend removing and dealing with marine mammals caught in fishing gear. Marine mammals would benefit by reducing incidental mortality and serious injury to the lowest levels practicable.

The Commission also believes that there is particular merit in the process that the National Marine Fisheries Service has proposed to assess and monitor the status of affected marine mammal stocks and to identify priority research and monitoring needs. The process will ensure critical scientific peer review and opportunity for public participation. Further, it will ensure that available funding and personnel are focused on the most critical problems.

Although the Commission believes that the Service's proposal is conceptually sound, it has questions, as noted earlier, about several aspects of the proposal. It is not clear, for example, how the Service would identify or in status-of-stocks reports take into account habitat degradation or destruction resulting from such things as coastal development, offshore oil and gas development, or fisheries-caused declines in important marine mammal prey species. Also, it is not clear whether the stock assessments would consider possible subtle decreases in survival or productivity that could result from repeated disturbance, environmental pollution, or other factors that may have sub-lethal effects. Further, it is not clear whether the formula proposed to be used to calculate the Potential Biological Removal would prohibit authorizing in all cases take levels that would cause a population stock to be reduced or maintained below its maximum net productivity level. For example, if the growth potential of a population is being affected by habitat degradation, stress due to repeated disturbance, or some type of direct human-caused mortality not identified or included in the total allowable take, the use of the default values proposed to be used to calculate the Potential Biological Removal when the population growth rate is unknown could result in authorizing take levels that cannot be sustained and which would not prevent the affected population from being reduced or maintained below its maximum net productivity level.

Thank you Mr. Chairman and members of the Subcommittee for this opportunity to advise you of the Marine Mammal Commission's views on this important issue. I would be pleased to try to answer any questions you may have.

Center for Marine Conservation

TESTIMONY OF THE CENTER FOR MARINE CONSERVATION
Before the
Subcommittee on Environment and Natural Resources
April 20, 1993

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to present our views on the reauthorization of the Marine Mammal Protection Act (MMPA). My name is Suzanne Iudicello; I am counsel for the Center for Marine Conservation. Our statement today is also made on behalf of the Environmental Defense Fund, Friends of the Sea Otter, The Marine Mammal Center, the National Audubon Society, and the World Wildlife Fund.

As you know, the diversity of views on numerous aspects of the MMPA is as varied as the interested communities and constituencies affected by the provisions of this landmark legislation. Our remarks today are limited to the aspects of the law that govern incidental take of marine mammals in commercial fishing operations, because of the September 1993 expiration of the Interim Exemption Program. As the reauthorization proceeds and your deliberations become more detailed, we expect you will need to hear individually from a variety of groups representing the full spectrum of views.

BACKGROUND

The Marine Mammal Protection Act was passed by Congress in 1972 to protect marine mammals of "great international significance. . .aesthetic and recreational as well as

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economic." For two decades its mandate has been to protect whales, porpoises, seals, and sea lions, walruses, polar bears, sea otters, and manatees through its major provision: a moratorium on the taking of all marine mammals by persons subject to U.S. jurisdiction.

The Act claims among its purposes protecting marine mammals so they do not "cease to be a significant functioning element in the ecosystem of which they are a part." Another goal of the MMPA is that the "incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing be reduced to insignificant levels approaching a zero mortality. . .rate."

The Act gives the Secretary of Commerce authority to waive the moratorium, if the best available scientific evidence reveals it would not disadvantage a marine mammal stock to do so. Certain limited exemptions are allowed for takes of small numbers of marine mammals for a variety of purposes, including incidental (not intended) takes during commercial fishing.

Marine mammals often compete with humans for the same fish, or occur in areas where fishing is conducted. As a result they are sometimes incidentally taken during commercial fishing operations. The regulation of such operations to protect marine mammals has become a critical, and often volatile, issue. Since its enactment, the MMPA has prohibited the take of marine mammals incidental to commercial fishing unless authorized by an incidental take permit or a small take exemption. The National Oceanic and Atmospheric

Administration (NOAA), as part of the decision-making on authorizing incidental takes, through an Administrative Law process, was responsible for determining whether or not a given marine mammal population stock was within its Optimum Sustainable Population (OSP). Only after such a determination could the agency issue a general permit authorizing takes, and issue regulations permitting incidental takes of marine mammals.

In 1984, the agency had issued eight, five-year general permits to domestic commercial fisheries on the West Coast, allowing the annual take of 2,120 Steller's sea lions, 45 North Pacific fur seals, 1,835 California sea lions, 2,155 harbor seals, 60 elephant seals and 200 cetaceans. Two small take letters of exemption also had been issued for East Coast fisheries for a take of small numbers of non-depleted species with a negligible impact. In January of 1988, NOAA announced in the *Federal Register* its intention to prepare an Environmental Impact Statement on the proposed reissuance of domestic and foreign general permits that were scheduled to expire by the end of the year. But while NOAA Fisheries was developing the impact statement, it became clear that there was insufficient scientific information, not only to claim that most of the marine mammal population stocks were within their OSP, but also to determine what the impact of commercial fishing takes would be on the stock. Without the OSP determinations, the agency could not make findings required to waive the MMPA moratorium and promulgate regulations authorizing the incidental take of marine mammals.

Also early in 1988, the U.S. Court of Appeals for the District of Columbia Circuit Court underscored the MMPA's mandate that no incidental take permits could issue without OSP findings. In *Kokechik Fishermen's Association v. the Secretary of Commerce*, the court upheld a lower court's ruling that set aside the marine mammal incidental take permit issued to the Japanese salmon driftnet fishery. The lawsuit challenged the permit on the grounds that NMFS allowed the taking of Dall's porpoise but did not authorize the take of other marine mammals, in particular depleted northern fur seals, which are prevalent in that area and frequently taken incidentally in salmon driftnets. The court declared that NMFS could not issue permits for Dall's porpoise if, northern fur seals (or, for that matter, other marine mammals for which a permit could not be issued) would inevitably be taken. This holding was in keeping with the strong policy of the MMPA to take a conservative approach in favor of protecting marine mammals.

The problem was intensified: NMFS was unable to determine OSP for affected marine mammal stocks by the end of 1988 and the *Kokechik* decision uncovered what was inherently flawed about the permit issuing system—lack of sufficient information to be certain that incidental takes would not harm marine mammal stocks. This situation brought together representatives of the environmental community and the fishing industry during the spring and summer of 1988 to find a way to enable fishermen to go fishing, yet minimize the impact of that activity on marine mammals. They hammered out a series of points that they presented jointly to the Senate Commerce Committee and the House Merchant Marine and Fisheries

Committee. In November, Congress passed the MMPA Amendments of 1988 establishing an information gathering program and an Interim Exemption Program for Commercial Fisheries.

IMPLEMENTATION OF THE 1988 AMENDMENTS TO THE MMPA

The 1988 amendments to the MMPA included in Section 114 a five-year program exempting commercial fisheries from the incidental taking prohibitions of the Act. This limited exemption allows incidental takes of marine mammals in fishing gear ranging from coastal gillnets in New England to massive trawls in the Bering Sea--interactions between 38 different fisheries and 40 species of marine mammals (except those in the eastern tropical Pacific yellowfin tuna purse seine fishery and California sea otters). The exemption was designed to allow commercial fishing to continue while the National Marine Fisheries Service (NMFS) stepped up its data gathering, observations, and research on marine mammal/fishing interactions. The objective of the Interim Exemption Program was to provide time to collect reliable information about marine mammal and commercial fishing interactions and to complete conservation and recovery plans, while at the same time allowing commercial fishing operations to continue. In return for the temporary exemption from incidental take regulations, the commercial fishing industry was to participate in the data-gathering program by carrying mandatory on-board observers, compiling log books, and reporting marine mammal interactions.

While the Interim Exemption Program allows the incidental take of marine mammals (except California sea otters), it does not allow intentional taking of Stellers sea lions, cetaceans, or any marine mammals from a population stock designated as depleted, such as northern fur seals.

The Marine Mammal Exemption Program (MMEP) created to implement the 1988 Amendments has not entirely fulfilled expectations or requirements. Our concerns with the program fall into several categories: level of participation and reporting; accuracy of data; enforcement and monitoring.

Program Results

The Interim Exemption was to have begun in the 1989 fishing season with the creation by NMFS of the Marine Mammal Exemption Program (MMEP). [54 Fed Reg 21910 (May 19, 1989)] Administrative delays and the slowness of developing a mechanism to register vessels and enter data received from fishermen resulted in the publication of categories of fisheries late in 1989, too late for that year's fishing season. [54 Fed Reg 16072 (April 20, 1989)] The first registrations occurred in time for the 1990 fishing season. [54 Fed Reg 21910 (May 19, 1989)]

That year 18,877 vessels registered for the program, and 12,055 submitted reports at the end of the season. Overall percentage of those reporting averaged 53 percent of those registering. However, the participation varied from fishery to fishery from as low as 2

percent of the vessels in the Alaska Metlakatla Fish Trap Fishery to greater than 100 percent in the California Klamath River Salmon Gillnet Fishery.

In 1991, NMFS monitored 44 fisheries, with 13,720 vessels registered for the program, and 10,358 submitting reports. Overall percentage of those reporting averaged 68 percent of those registering. However, the participation varied from fishery to fishery from as low as 2 percent of the vessels in the Alaska Salmon Troll Fishery to greater than 100 percent in the California Klamath River Salmon Gillnet Fishery, Alaska Peninsula Drift Gillnet Fishery, and Alaska Bering Sea/Gulf of Alaska Groundfish Trawl Fishery

The categories were modified again in 1992. From those participating fisheries, 13,209 vessels registered, and logbook reports are still being submitted.

Preliminary data from three years of Vessel Owner Reports show the following:

	1990	1991	1992
Estimated number of vessels	21,859	20,941	27,492
Total number of vessels registered	18,877	13,720	13,209
Total vessels reporting	12,055	10,358	not available

In the four years since the exemption program has been in effect, observers have monitored 18 fisheries. The 1988 amendments called for a 25 to 35% level of observer

coverage. In 1990, 8 out of 11 (73 percent) of the Category I fisheries had a percent observer coverage less than the 20 to 35 percent mandated by Congress. In 1991, only four of nine Category I fisheries had observer coverage less than the mandated level. For those eight fisheries in 1990 and the four in 1991 the observer coverage ranged from five to ten percent.

Program Criticisms

One of the ongoing criticisms of the Marine Mammal Exemption Program has been the lack of current information. Agency verification, data entry, receipt of logbooks from captains, receipt and analysis of observer data, all have fallen far beyond expected schedules. For example, it has become apparent that some fishermen waited until the beginning of their new season to submit logbooks from the previous season, rather than at the completion of their fishing season or by December 31 of the year fished, as required by the program regulations [54 Fed Reg 51718 (December 15, 1989)]. It is unclear whether NMFS enforced the logbook deadline requirement by refusing to issue a current season decal to skippers who turned in overdue logbooks. This delay has meant that the agency annually reclassifies fisheries without benefit of the results of the preceding year's data.

A second problem emerged when the agency undertook its logbook verification analysis. This analysis revealed that observed days' marine mammal interactions did not mirror the same days' logbook reports. At the same time, the tardy verification process was not conducive to correcting errors associated with late reporting because such errors were not caught until far after the event. The lag time also has meant the agency has not compared

yearly data on effort, registration, reporting and takes in time to recognize trends in fishing activity, reporting behavior or marine mammal populations. For example, if reported kills decreased in a particular fishery between 1990 and 1991, was it due to cleaner fishing, decreased reporting, reduced fishing effort, or decline in the presence of marine mammals in the area? The agency's ability to answer such questions is crucial to managing marine mammal/fishery interactions and to achieving the zero mortality rate goal of the act.

In addition, the following problems have plagued the marine mammal exemption database. Many of these problems will be discussed in detail in a forthcoming CMC publication "Incidental Take of Marine Mammals in Commercial Fisheries of the U.S."

- All information, observer and logbook, is submitted, entered, and analyzed at the regional level. This approach has not been conducive to real-time enforcement or verification and has contributed to delays in the verification and quality control at the agency's headquarters.
- There is no uniform standard of total fishery effort. Each fishery/owner records fishing effort differently. The best example are gillnetters, who may record effort as time on the water, the number of hours a single net was fished, or the number of hours several nets were fished. Furthermore, effort as recorded by vessel owners and observers is often inconsistent and thus does not lend this data to accurate statistical verification or comparison.
- Although the agency has attempted to use landing data to determine the number of vessels in a particular fishery, for the most part, the nature of the

"universe" for many fisheries is still unknown. There are vessels that are not registered and are unaccounted for in the estimated number of vessels in a fishery. As demonstrated above in Table A, not all vessels registered submit logbooks, but may continue to fish. These two factors contribute to a probable underestimation of marine mammal interaction, injury, and mortality, and an overall inability to estimate accurately the level of MMEP participation by the fishery.

- All the above results in a serious underestimate of total marine mammal take, since the agency has no idea what proportion of total fishing effort the logbooks represent, nor a uniform standard to measure that effort.
- Finally, enforcement has been minimal. No instance is known of an authorization to fish having been denied because of failed registration or reporting, nor has any in-season regulatory action occurred based on either observer reports or logbook data. Since the inception of the program, the agency has prosecuted only a few incidents of illegal marine mammal takes.

Marine Mammal Interactions

The magnitude of the marine mammal interactions is demonstrated by the information generated by the NMFS interim exemption program. Although that program has been nowhere near as successful as had been hoped in generating data, it is clear that take incidental to fishery operations is a problem of substantial proportions. Based on reports submitted by fisheries themselves, 250,000 marine mammal interactions with fishing gear

occurred in 1990 out of 571,000 fishing days. Over 91,000 marine mammals were reported to have been harassed, 2,100 injured, and 2,600 killed. Based on reports submitted by fisheries themselves, 52,639 marine mammal interactions with fishing gear occurred in 1991 out of 131,935 fishing days. Over 50,676 marine mammals were reported to have been harassed, 623 injured, and 1,340 killed.

Reports from observers indicate that the data generated by fishery participants are likely to significantly underestimate mortality levels. For example, the mortality estimates of harbor porpoise in the Gulf of Marine sink gillnet fishery for 1990 alone based on observer reports (2,400) was nearly 30 times greater than the 85 deaths reported by logbook participants in that fishery. In 1991, observers reported 1,700 harbor porpoise killed while logbooks tallied only 93.

The logbooks contain numerous examples of misidentified or unidentified marine mammal species. For example, NMFS continues to allow the reporting of North Atlantic gray seals in Pacific fisheries, and tropical species in Alaskan waters. Unidentified marine mammals show up on reports in the following categories:

	Harassed		Injured		Killed	
	1990	1991	1990	1991	1990	1991
Unidentified Dolphin or Porpoise	7	198	5	4	46	16
Unidentified Whale	4	7	-	-	-	-
Unidentified Seal	4,750	3,620	57	47	142	16

Unidentified Sea Lion	12,902	1,020	30	15	153	30
Unidentified Seal or Sea Lion	30	6,914	-	84	-	32
Unidentified Pinniped	-	93	-	2	-	1
Unidentified Species	1,233	442	527	15	119	21

The mortality represented in this table is not reflected in the species or stock mortality estimates, and as such is another indicator of underestimates. Detailed analyses of interactions by fishery and by marine mammal stocks are set out in Chapters II and III of this report.

Finally, the observer-gathered data did not include information on the nature of the interactions, that is, how they occurred in the course of fishing operations, in order to discover gear or operational improvements. Nor did the program ever develop alternatives to onboard observation as a means of verifying data from logbooks in fisheries where vessel size or other factors prevented use of observers.

Whatever its shortcomings, the MMEP has illustrated that substantial amounts of information can be garnered with a combination of voluntary reporting and formal observers. The above analysis indicates as well, that many of the problems with the process and data base are of manageable proportions and could be rectified administratively prior to a legislative incidental take regime. Finally, the MMEP has enabled us to identify those

fisheries and marine mammal stocks where incidental takes are of significant concern. This information can serve as the basis for a targeted response that will reduce incidental takes, conserve marine mammal populations, and meet the original goals of the MMPA while enabling responsible fishing to continue.

These shortcomings of the MMEP should be corrected for this final year of the program, and the agency should be encouraged to complete its data analysis of observer and logbook data this year as information critical to the reauthorization debate. In addition to enacting the exemption in 1988, Congress directed the National Marine Fisheries Service to develop a regime that will take the place of the exemption beginning at the end of this year.

The agency has proposed a framework built around scientific guidelines for taking, including allowable takes of depleted and endangered species. A detailed proposal, as well as a Draft Environmental Impact Statement, were released in May, 1991. Following two comment periods, workshops, and ongoing consultation with affected parties, the agency delivered its proposed new regime to Congress in November, 1992.

The Marine Mammal Commission has provided its advice and recommended guidelines to govern the incidental take of marine mammals after 1993, and has urged that the basic regulatory framework and MMPA goals be retained. Conservation groups fear that the NMFS's proposed regime will weaken the fundamental protection of the MMPA by lowering the standard of proof required to allow incidental mortality and generally not providing

adequate protection to marine mammals consistent with its longstanding goals objectives and requirements. The fishing industry is concerned that if specific quotas for marine mammal takes are set, fisheries could be shut down once the quota is reached. The agency is trying to devise a program that is targeted on problem areas and aimed at acquiring more and better information about interactions.

Recognizing the full legislative plate this session, it is still critical that the MMPA be reauthorized before the end of 1993. Unlike most reauthorizations, where the authorizing date may come and go without much effect, the expiration of the program created in Section 114 of the MMPA will bring back the problematic status quo prior to 1988. The Interim Exemption expires at the end of October, and without it, the taking prohibitions of the MMPA will kick in again, making it impossible for commercial fishing operations to proceed without illegal takes of marine mammals. The conservation community is firm that it will not stand by for a simple reauthorization that continues the exemption. We are, however, committed to finding a mechanism, consistent with sound principles of wildlife management and consistent with the MMPA, that would provide a scientific rationale and basis for determining the number of marine mammals that may be taken incidentally in the absence of an OSP determination.

KEY CONCERNS FOR THE 1993 REAUTHORIZATION

We have agreed as part of the ground rules of our discussions with the fishing industry that issues under negotiation will remain within the group until we reach agreement. Among the issues on the table are many which will seem to you conspicuous by their absence in the following list of concerns, such as quotas or the zero mortality rate goal. We hope to be able to present the group's views on these and many other topics by early summer. There are several general areas, however, that we have advanced in other forums that characterize the basic position of the conservation community with regard to reauthorizing the MMPA.

- **The fundamental protective nature of the statute should be retained.**

Takes of marine mammals should be authorized by a process that holds the proponent of the taking accountable. The goal of recovering depleted marine mammals to the range of their optimum sustainable population is an integral part of that foundation. Even though OSP determinations have not yet been made for most species, the concept of OSP is a scientifically sound means of management, comparable to the notion of MSY in fisheries. Until we have an equally valid substitute management mechanism, OSP must be retained.

- **The incidental take authorization process should provide a level playing field for all takers of marine mammals.**

That is, it should not be more difficult for a marine mammal scientists to get a permit to study a species than it is for a vessel to get a permit to take that species incidental to fishing operations. An equitable process authorizing takes also would account for all sources of takes, and not focus a regulatory regime on only one source. For example, we are

concerned that the regime proposed by the agency focuses only on fishing takes without a mechanism to integrate mortality from other human activities.

- **Acquisition of information on the status and trends of marine mammal stocks is critical to making sound conservation decisions.**

Although the Act calls for such research now, it does not set priorities. In an effort to focus the agency's limited fiscal resources, criteria for setting data collection priorities should be part of the reauthorization. The agency proposal sets such an ambitious schedule for collecting all of the scientific data necessary, that we fear it cannot be accomplished with reasonably available resources.

- **Endangered marine mammals should receive no less protection than other endangered species.**

Incidental takes of endangered and threatened marine mammals should be governed in accordance with the provisions of the Endangered Species Act, including Section 7 consultations. As such, we disagree with the agency proposal that would allow intentional lethal takes of threatened and endangered marine mammals.

- **The MMPA should provide a means to focus its regime to govern incidental takes on activities where those incidental takes create a biological problem for the marine mammal population or stock.**

The period of the Interim Exemption has generated information on levels of take in commercial fisheries and population abundance estimates for numerous species of marine mammals. Over the same period we also have learned more about the nature of interactions--how and why they occur. This information should be used to craft a regime that focuses limited resources first on reducing takes of any type from marine mammal populations where those takes are considered unsustainable.

Finally, we should begin laying the stage now for gathering environmental and cross-cutting resource information that will enable us to move toward the larger ecosystem management goals that the MMPA embraces. For example, it is important to have a means to examine and compare mortality from a variety of causes so cumulative impacts and the array of human caused interactions can be evaluated. This includes not only direct mortality such as that caused by vessel collisions, but also indirect impacts such as reduction of marine mammal prey species. While it is important to continue to control the incidental take of individual species to promote their own conservation, it also is time to take a look at the big picture. The various laws that control the utilization of marine resources need to be brought together and administered under the common goal of ensuring the long-term protection of the quality of the marine environment. The MMPA reauthorization offers an opportunity to begin that difficult and challenging task. It could set in motion the events needed to establish a truly comprehensive management program for protecting the complex ecological relationships that, taken together, determine the health, stability and productivity of the marine

environment. In the short term, however, we must focus on managing human activities from an ecosystem perspective.

NEGOTIATIONS AMONG INTERESTED PARTIES

As you know, representatives of the conservation community and fishing industry have been meeting to discuss these and other issues. Participants come from local and national organizations, recreational and commercial operations, and communities from Alaska to Maine--more than 20 organizations in all. We recognize the urgency of the September expiration date, and have set an ambitious timetable for ourselves. We look forward to delivering to you by summer a package that will propose a comprehensive regime to take the place of the interim exemption.

CONCLUSION

The marine environment is now showing signs of major stress. In the Bering Sea, Steller sea lions continue to decline despite rare crashing; harbor seal populations have been in also begun to show declines; some commercially valuable fish species are depleted, and seabirds are showing dramatic drops in abundance estimates. These are warning signals that can no longer be ignored.

Thank you for your attention. I would be pleased to answer any questions and we look forward to working with you during your deliberations on this important marine conservation law.

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STATEMENT OF

GREENPEACE

ON THE REAUTHORIZATION OF

THE MARINE MAMMAL PROTECTION ACT OF 1972

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES

OF THE

UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON MERCHANT MARINE AND FISHERIES

DRAFTED AND DELIVERED BY

GERALD B. LEAPE
LEGISLATIVE DIRECTOR

APRIL 20, 1993

Mr. Chairman, members of the Subcommittee, my name is Gerald Leape and I am the Legislative Director for Ocean Ecology for Greenpeace and its 1.8 million supporters in the U.S. On behalf of Greenpeace, I am grateful to have the opportunity to present our views on the reauthorization of the Marine Mammal Protection Act (MMPA). Initially, I will detail some specific substantive concerns regarding the various issues within the reauthorization of Section 114, the Marine Mammal Exemption Program. The main focus of my statement will be on alternatives for funding what is expected to be substantially increased costs of implementation of the new program. The other aspects of the MMPA not withstanding, my recommendations are only for funding those aspects of the MMPA that deal with commercial fisheries interactions with marine mammals.

We believe that the industry that benefits from the extraction of the resource, in this case the catching of the fish, should pay the cost of management of that activity. The fishing industry is the only extractive industry that pays no direct fee for harvesting a public resource. This "leave them alone" treatment of the industry by the federal government was adequate when there were plenty of fish. However, those days are over. Things must change.

With few exceptions, if there is a lack of information regarding the impacts of the proposed additional extraction activity, and the industry cannot produce that needed information, that activity, in this case fishing, should not be allowed to proceed. We can no longer take the risk of unknown long term permanent impacts to a fragile marine ecosystem. The Steller Sea Lion offers us a good example for this situation. There is a growing consensus that overfishing of the Steller's prime food source the pollock is a major factor in the continuing decline of the animal yet, the level of fishing continues to grow. This continuing denial is directly contradictory to the leadership role that the United States has played in the Southern Ocean on this issue. The U.S. has not hesitated to call on the Russians and the Japanese to stop the overfishing of krill because of its potential affects on predators such as the penguin. If fishers want to continue to fish, the burden should be on them to show that there fishing will not adversely impact the marine mammal populations that interact with their fishing method. Acceptance of this obligation is essential to the success of any regime governing the interactions of marine mammals and commercial fishing that will still be consistent with the goals of the MMPA.

As my colleague, Suzanne Iudicello said in her statement, we have begun the process that we all swore we would avoid after the experience five years ago. I personally was not there but I heard enough stories that I felt like I had endured the trials

and tribulations myself. While I do not have anything additional to share with you regarding the current deliberations with representatives from the fishing industry, I am encouraged to also report that I feel we are making progress. Rome wasn't built in a day so we are heading out to Seattle for another round of negotiations this coming weekend. We hope to have something to report to you in June.

Prior to that time, I would like to submit for your consideration some thoughts and recommendations to start the debate. My comments on the MMPA will be limited to the Marine Mammal Exemption Program (MMEP) and what must follow. Five years ago, the fishing industry and the conservation community engaged in an arduous set of negotiations that culminated in the MMEP affectionately known as the "Fish Fix". In exchange for a five year exemption from incidental take permit requirements of the MMPA, the fishing industry agreed to aggressively push for full registration of the U.S. commercial fishing fleet and comprehensive data collection efforts and educational programs to teach fishers how to reduce their marine mammal take in the course of commercial fishing operations. The National Marine Fisheries Service (NMFS) agreed to aggressively pursue Optimal Sustainable Population (OSP) for all marine mammals under their jurisdiction. As we heard earlier, it was this dearth of scientific information that had been the basis for the judge's opinion in the Kokechik decision prompting the 1988 negotiation. Through this collection of data, NMFS agreed to assemble a

comprehensive data base to serve as a foundation for a permanent regime that would go into effect October 1, 1993.

I am sorry to report that neither of these obligations have been completely fulfilled. Although we support making corrections during this the final year of the exemption to improve the information that is gathered, we vigorously oppose any efforts to use this lack of complete information to leverage an extension of the current exemption for commercial fisheries from the moratorium on takings under the MMPA.

We need to accept the fact that mistakes were made on all sides, obligations were not fulfilled and that is unfortunate. Let us not forget that giving additional time to NMFS does not always bring us additional results. Getting past this stage of frustration, the following questions emerge; Where do we go? What do we do? How do we pay for it? Since negotiations are still ongoing with the fishing industry, we do not have a specific program to talk about today. However, without going into detail on substance or money, I can lay out for you broad priorities for the package and a rough estimate of the overall expected price tag for full implementation of a new regime. We realize that determining the cost of the program before agreeing to the details is like putting the "cart before the horse" but the appropriations process has started so we are left with little choice. We are also committed to achieving enactment of a new program by October 1, 1993 if at all possible.

We support continued commercial fishing as long as it does not jeopardize the viability of marine mammal populations and other fish species, continually reduces the impact on the habitat on which these species depend and begins to pay for the privilege of catching and selling a public resource. What does this mean you ask? It means aggressively pursuing research to determine the
population status and health of the rest of the marine mammals and fish species off our coasts. Of all the marine mammal populations off our coasts, we are only sure of the status of one quarter of them. Industry must play an important role in assisting the federal government in filling in the current lack of information on these species.

In addition, we should focus on the status of mammals before they are listed under the Endangered Species Act not waiting till it happens. We must maintain the current protections afforded under the Endangered Species Act for Endangered and Threatened animals as a safety net for those species for whom preemptive action is not successful.

In order to maintain the integrity of the goal of the MMPA, we need to develop a system, including incentives and penalties, that will bring about continued reduction in takes where there are significant takes of marine mammals and other species. For this new program to work, we must see stronger partnerships formed between the industry, the government and the conservation

community in determining the health and trends of all marine mammals off our coasts and in new gear development and testing.

Using these general guidelines, we, out of necessity, need to focus our energies where the interaction problem is most significant and to complete determinations in any fisheries where there has not been enough effort to determine whether or not there is a problem.

HOW TO PAY FOR IT.

In these days of declining federal budgets, it is essential that federal dollars be spent more effectively. We can begin to work toward this goal by starting the shift of fiscal responsibility for management from the federal government to the industry. Only by beginning to realize that transfer of funding responsibility can we free up the necessary federal dollars to engage in the research to determine the status of marine mammals wherever possible. This research might also provide critical information which would be useful in determining whether time and area closures could be part of the solution to reduce takes of marine mammals. In addition, freeing up federal funding is essential greater engineering research programs to develop less wasteful gear.

During this historic reauthorization of the Magnuson Act and

the Marine Mammal Protection Act, the temptation is great to put together a coordinated financing package to finance both acts. In theory, it is a laudable goal. During this reauthorization especially, fishers are vulnerable to being nickeled and dimed to death by all sorts of new fees and taxes that might be necessary to assist in paying for the program. We sympathize with their potential frustration and would welcome coordination through a single financing structure with qualifications.

Our major concern with a single financing package is that it has the potential to blend the solutions for the very different problems we face under each statute, the Marine Mammal Protection Act (MMPA) and the Magnuson Fishery Conservation and Management Act (MFCMA), together to the detriment of both. The problem fisheries that need to be addressed in each of the acts are different and therefore require different financing structures to find solutions. We will fight any backdoor effort to subjugate the goal of the MMPA to reduce takes to the MFCMA goal of maximum sustainable yield. To be specific, there are some sectors of the fishing industry who would like all of us to believe that if there is insignificant interaction with marine mammals, that the bycatch of all species is insignificant. Therefore there is no need for an observer of any type. First, that is not true. Second of all, that directly undermines one of our top priorities within the MFCMA which is to establish a joint federal government-fishing industry program to reduce bycatch of non target fish to insignificant levels. This bycatch initiative

to reduce the take of non target fish would require observers on each boat.

The cost of the marine mammal/ fisheries interaction regime, at NMFS conservative estimates, would be approximately $19 million or almost double the current federal appropriation. In addressing the funding question for marine mammal observers and research, we believe that it is important to look at all possible funding sources.

FIRST STOP APPROPRIATIONS

The first stop is appropriations for fiscal year 1994. Together with the fishing industry, we will work with the Appropriations committee to try and get them to add to the requested $10 million that has been requested for items to implement the marine mammal/fisheries program. We will be sending a joint letter to the appropriations committee to urge them to appropriate this higher amount for fiscal year 1994. In addition, we are urging increases in all the relevant line items in the President's proposed budget that are relevant to the implementation of a new successful program. These include increased money for population assessments, gear research, conservation engineering and a restoration of Saltonstall-Kennedy funding (S-K). In the event that we are not successful in our

quest for this dramatic increase in appropriations, we need to put together a program that will including a funding source that is stable. This program must be equitable and assessments should be heaviest on those who have the greatest problem.

Pursuing a coordinated approach to generate support for additional funding, we hope will at least result in some increase from current levels.

FUNDING AVAILABLE FROM CURRENT TAXES AND FEES

Second, we will take a critical look at current funding sources to see if there is potential from current fees collected to divert some funding from these programs to help pay for the increased cost of the new program. NMFS estimates that the cost of full implementation of their program would cost $19 million annually. The Saltonstall-Kennedy (S-K) program is a potential outlet. There seems to be at least a certain percentage of that funding that goes toward deficit reduction. The administration zeroed the funding for this important program but we will work with the appropriations committee to attempt to get this money restored. We think this program should be looked at for being a cornerstone in developing solutions to reducing the catch of marine mammals.

A third outlet is to look at the current marine fuels exemption that benefits the commercial fishing fleet. If there

could be a dedicated fund that would ensure that the money does not go for deficit reduction, we might support a repeal of this exemption. With the proper funding mechanism, there would be at least some acceptance within the industry for this action.

THE LICENSING OPTION

A fourth source is to look at the registration system for the commercial fishing fleet. In the interest of getting the industry to pay something for the privilege of catching a public resource the licensing system offers a mechanism for placing the burden on those sectors of the fishing fleet where the problem is greatest. The licensing structure should be structured so the greatest fees are exacted from those sectors of the fishing industry where the interaction problem is greatest. Acceptance of this system would set the foundation for an incentive system that would involve rebates of the fee for improved performance in the form of reduction of marine mammal takes. There should also be lower fees for those who offer to be the test boats for the new gears that are developed. In a particular fishery where there is known to be a frequent or significant interaction problem, there would be a mandatory higher fee assessed on all who refused to take available observers necessary to monitor performance.

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THE TAX (REVENUE ENHANCEMENT) ALTERNATIVE

A fifth outlet is to tax the product. A percentage of the ex-vessel value of the fish caught. These fees could be assessed per fishery according to the funding necessary to address the problem. A concern in this area is that any fee value that is assessed be equitable among existing boats. Fees could be assessed according to level of catch of marine mammals and total catch of fish.

FINES AND PENALTIES

A sixth outlet is to assess natural resource damage assessments on a per animal basis. The Department of Interior has used this system numerous times to assess fines in cases oil spills or other maritime disasters. Most recently, the Exxon Valdez was a subject of these assessments. All fees collected would go into a dedicated fund to be used for implementation of the program.

A final outlet which has not been discussed with the affected interest is the possibility of collecting a fee from whale watchers which would be dedicated to additional research on the status of stocks.

NEW MECHANISM FOR ENSURING THAT THESE FUNDS ARE USED FOR THE INTENDED PURPOSE

Equally important to the debate surrounding a new system of financing is developing the mechanism to ensure that the additional monies collected are used for these functions. One problem that has arisen is the sense that dedicated funds are used more for deficit reduction than for the services for which they were intended. This fear is legitimate and one that we in the conservation community would like to see addressed. Another fear is that if we attempt to get additional revenue by increasing the diversion of resources from current trust funds, it will be scored against NMFS budget and will not be a net increase. A potential outlet is to create a fund which is a pass through and is not subject to appropriations. Another possible mechanism would be to create a new account at the National Fish and Wildlife Foundation that could be used specifically for the purposes of implementing this program.

These are all alternatives for discussion purposes and no official position has been developed among the industry and the conservation community as to which is the preferred alternative.

CONCLUSION

The bottom line of this process is that we need to find a solution, a new program that will maintain the integrity of the

Marine Mammal Protection Act while allowing our commercial fisheries to continue.

We look forward to working with you, Mr. Chairman and the rest of the committee in reauthorizing this important program before the October 1, 1993 deadline.

TESTIMONY

ON BEHALF OF

THE INTERNATIONAL WILDLIFE COALITION
AND
THE HUMANE SOCIETY OF THE UNITED STATES

BEFORE THE
SUBCOMMITTEE ON
ENVIRONMENT AND NATURAL RESOURCES

REGARDING

REAUTHORIZATION OF THE MARINE MAMMAL PROTECTION ACT

Interactions Between Commercial Fisheries and Marine Mammals

PRESENTED BY MS. SHARON YOUNG
WILDLIFE CONSULTANT

APRIL 20, 1993

Good morning. I am Ms. Sharon Young, wildlife consultant for the International Wildlife Coalition (IWC). I appreciate having the opportunity to testify today on behalf of the IWC and The Humane Society of the United States with regard to the problem of the management of fisheries interactions with marine mammals. We are also joined in this testimony by the Animal Protection Institute, and our combined constituency of two million persons worldwide.

We sincerely appreciate the Chairman's strong commitment to the principles of the Marine Mammal Protection Act (MMPA) of 1972 and look forward to working with you and the Committee staff during the reauthorization process.

INTRODUCTION

As you know, one of the primary goals of the MMPA is to reduce marine mammal mortality to "an insignificant level approaching zero." The zero mortality rate goal is fundamental and must not be eroded. Without it, marine mammal populations cannot be expected to remain at, or recover to, their optimal sustainable populations (OSP). We are concerned that the past five years of the marine mammal interim exemption program and the current National Marine Fisheries Service (NMFS) proposed regime to govern fisheries interactions have undermined the original legislative intent of Congress when it first passed the MMPA in 1972. Not only do the NMFS proposals undermine some of the goals of the MMPA, but significant flaws in the proposal continue to leave marine mammal populations without sufficient protection from excessive takes by the fishing industry. Congress and the American public have long supported legislation which fully protects marine mammals from unnecessary mortality; however, that protection has never been achieved. The overriding concern of the organization that I represent today is that the reauthorization of the MMPA must achieve verifiable and significant reductions in the overall level of marine mammal mortality which occurs in fishing operations.

BACKGROUND INFORMATION

For the past five years, under the interim exemption program, NMFS has been gathering data to assess the nature and severity of the problem of marine mammal interactions with fisheries. These data show that interactions occur to a far greater extent than Congress or the American public believes. In fact, NMFS currently estimates that more than 100,000 marine mammals are killed each year. This astounding rate of death does not even include natural mortalities to which all populations are subjected. After 20 years of MMPA protection, fishery kills have resulted in NMFS placing 31, out of 64 interaction stocks, in a category prioritizing them for most urgent study. In just five years of the interim exemption, three more stocks of marine mammals have been accepted or proposed for listing as threatened under the endangered species act or as depleted under the Marine Mammal Protection Act. Two additional

stocks have experienced severe losses and are being considered for petition action to list them for protection. This is a tragic pattern which cannot be allowed to continue. Crisis management must cease. NMFS must take a pro-active stance to prevent problems. This can only be done by mandating immediate reductions in incidental takes, based on the data which has been gathered during the past five years. Investment in preventing problems is much less expensive fiscally and biologically than the cost of trying to correct serious species depredations.

When Congress passed the interim exemption program in 1988 it directed NMFS develop a plan to expeditiously reduce unnecessary mortality. Instead of immediate action, NMFS has proposed a system which, by their own admission, will not even begin to address the critical issues of quotas of marine mammal takes, or the development of monitoring systems and enforcement measures for AT LEAST two more years. During that time NMFS has stated that it expects fisheries to effect voluntary reductions in marine mammal mortalities. Voluntary reduction in kill was also a charge made by Congress to the industry during the present five-year exemption program. However, such voluntary reductions have not occurred. Without a system to inform fisheries of a mandatory cap on incidental take, and without a way to monitor and strictly enforce such a system, reductions in mortality will not occur in the future. Therefore, we make the following:

SUMMARY OF RECOMMENDATIONS

1. Establishment of fishery-specific regulations limiting take of marine mammals, to be in place within two years of reauthorization of the MMPA (the Act).

2. The allocation of monies to fund and conduct research into mitigation techniques to reduce incidental take.

3. The immediate and continual reduction of incidental and intentional lethal takes of marine mammals toward the zero mortality rate goal of the MMPA, with immediate emphasis on endangered, threatened and depleted stocks.

4. The use of historic carrying capacity wherever possible as a basis for making decision on Optimal Sustainable Populations (OSP) of marine mammals.

5. Strict and mandatory enforcement and penalties to ensure compliance with all portions of the Act and its regulations relating to issues such as registration, monitoring of catch, and quotas.

6. Reduction of inequities in the permitting process that may result in unnecessary deaths of marine mammals.

SPECIFIC RECOMMENDATIONS

1. Establishment of fishery-specific regulations limiting take of marine mammals, to be in place within two years of reauthorization of the MMPA (the Act).

The Marine Mammal Protection Act was constituted in 1972 to protect marine mammals, and the public has long supported a level of protection which has never been fully realized. This goal of reducing mortality to "insignificant levels approaching zero mortality" can only be realized with the establishment of regulations which establish quotas, timetables for and levels of mandatory reduction of take. Monitoring programs and restrictions need to be in place expeditiously in order to provide the fishing industry with concrete expectations of reduction in take and penalties for failure to comply.

Despite the critical need for these regulations, NMFS has proposed to delay such actions. Their proposal states that fishery specific regulations will not be in place for more than two years after signing of the legislation. Instead NMFS proposes to concentrate on the establishment of scientific review committees, review of marine mammal stocks, categorizing fisheries and collecting more information on fisheries interactions with marine mammals. Which much of this effort is necessary, it is both time and resource consumptive to fill all of the known data gaps in the populations' biology information for marine mammal stocks. The timelines for correcting erroneous information and filling information gaps would need to be at least 3-5 years and would consume tens of millions of dollars. NMFS is already spending $12 million a year for the interim exemption program whose sole purpose is data gathering.

It is far more cost effective to begin the program by utilizing data which NMFS has already collected during the past five years of the exemption program. In 1988, Congress mandated collection of data on marine mammals and fisheries interactions. From this program, NMFS has information available on how many animals of each stock are taken by what fisheries in specific times and locales. These data should form the basis for determining reductions in incidental take which are necessary for each fishery.

Providing incentive to conduct stock assessment has been lacking in the past. Expeditious establishment of fishery specific regulations which mandate reduction in take based on existing information would provide the needed incentive for conducting stock assessment. This information would be critical to making OSP determinations and to making more accurate determinations of necessary levels of reduction in incidental take.

Therefore, we believe that the MMPA should be amended to establish fishery-specific regulations limiting the take of marine mammals within two years of reauthorization of the MMPA (the Act).

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2. The allocation of monies to fund and conduct research into mitigation techniques to reduce incidental take.

It may be unreasonable to expect fisheries to reduce their level of take without incentive or means to do so. The zero mortality rate goal in the Act provides the incentive, but some research is necessary to provide the means. In the past, research into methods of mitigating the take of marine mammals has only been funded in crisis situations, such as when marine mammals are about to be designated as threatened or depleted or when public outcry over a particular situation mandates a reduction in the incidental take of marine mammals.

The NMFS should implement a pro-active program on mitigation research. NMFS has proposed budget categories which would fund monitoring of take and stock research; however, they have not provided any specific plan to ensure the occurrence of research designed to reduce the level of take of marine mammals. Any current information pertaining to methods of reducing take should be promptly disseminated to members of the fishing industry through aggressive education efforts. Further research is needed and should begin immediately. Results of this research will help reduce the take of marine mammals in fisheries which require immediate and substantial reductions in take. Results of this research may also assist other fisheries with less significant interactions to reduce their take. This will help prevent the occurrence of additional problematic levels of interactions. Implementation of an adequately funded mitigation research program to reduce marine mammal takes will provide immediate benefits to both commercial fisheries and to marine mammals.

Therefore, we believe that monies should be allocated for the specific purpose of conducting research on mitigation techniques and new technology to reduce incidental take, and that this research should begin immediately upon adoption of the new commercial fishery interaction regime.

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3. The immediate and continual reduction of incidental and intentional lethal and takes of marine mammals to work toward the zero mortality rate goal of the MMPA.

The MMPA contains an important provision which mandates a zero mortality rate goal. The intent of this goal is to reduce mortality to insignificant levels approaching zero. We acknowledge that even the most scrupulous of fishing operations will accidentally take some marine mammal lives in the course of operations. However, little effort has been made in most fisheries to reduce take. In fact, several fisheries kill marine mammals in excess of thousands of individual animals. Clearly, such take is not at levels which are approaching zero.

The NMFS has proposed a system which would establish proposed biological removal (PBR) levels for each stock of marine mammals. The PBR levels are to be based on the best available information of the abundance of the stock and its reproductive rate. They also include a default multiplier which is designed to ensure that stocks not be taken in excess of their recruitment. .We support the need to determine a number which is the maximum tolerable level of mortality for each stock. However, we believe that this number should not function as a quota. NMFS has proposed that fishery operations make reductions in take down to this PBR level, but has not mandated reductions below this PBR level. As we have pointed out, the zero mortality rate goal is intended to drive reductions in take toward an insignificant level approaching zero, not simply to a level which is the maximum tolerable level for the stock.

We believe that there should be no intentional lethal takes of depleted, threatened or endangered marine mammals. Any other intentional lethal takes should be allowed only after a rigorous permitting process and only with a user-funded research program to reduce these takes. **Permits to fish should not automatically be considered permits to intentionally kill marine mammals, as NMFS has proposed.**

Some fisheries intentionally kill hundreds of marine mammals each year. This occurs, in part, because no mitigation research is funded to help them prevent marine mammals from interacting with and damaging gear and taking fish. It is also due to misunderstanding about the intent of the Act to protect marine mammals from unnecessary death. The past five years of the interim exemption program (which allowed fishermen to kill almost unlimited numbers of marine mammals as long as they reported the kill to facilitate data gathering) has only deepened this misunderstanding of the intent of the Act.

For these reasons, the MMPA should be amended to require the immediate and continual reduction of incidental and intentional takes of all marine mammals to work toward the zero mortality rate goal of the MMPA.

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4. The use of historic carrying capacity wherever possible as a basis for making decisions on Optimal Sustainable Populations (OSP) of marine mammals.

The MMPA provides for making determinations that specific stocks of marine mammals are at their Optimal Sustainable Populations (OSP). However, for many populations, OSP will be difficult and expensive to determine, and for others, nearly impossible. For populations that are nearing OSP, with sufficient data on abundance and recruitment, the Act requires determination of carrying capacity. NMFS has proposed using current carrying capacity to make OSP determinations. This is not acceptable.

The oceans are not as healthy or abundant in resources as they once were. We need to work to improve their quality. Accepting current carrying capacity means accepting stocks which are limited in growth by quality of habitat, rather than encouraging movement toward restoration of their historic abundance.

An example of the problem of using current carrying capacity to determine OSP can be seen in the case of the northern Right Whale. This critically endangered mammal has a population of less than 500 individuals. Intensive study has not seen any real increase in this population, despite the fact that there is no direct exploitation of its members. In wildlife management, populations which are stable over a long period are generally considered to be at carrying capacity. No serious scientist or manager would argue that Right whales are at OSP, simply because we know that the oceans once sustained thousand more of them. However, it could be argued that this lack of growth in population during the last fifty years, may mean that they are at "current carrying capacity". This case is representative of others where it can be clearly seen that use of historic carrying capacity is necessary in order to assure proper calculation of OSP.

Therefore, we propose that the MMPA should retain the use of historic carrying capacity wherever possible as a basis for making decisions on Optimal Sustainable Populations of marine mammals.

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5. Strict and mandatory enforcement and penalties to ensure compliance with all portions of the Act, and its regulations, relating to issues such as registration, monitoring of catch and quotas.

The past five years of the exemption program were intended as a period of data gathering on marine mammals and fisheries interactions. The data which have been gathered are daunting in their abundance and discouraging in their trends. Over the past 5 years the number of boats registering with the program has continued to decline, although the total number of boats estimated to be fishing has not declined significantly and, in fact, new fisheries have begun. Although registered fishermen are required to submit logbooks of marine mammal interactions, the number of submissions is declining and lags far behind the number of registered boats. Data contained in log books are erroneous. Where fisheries were monitored by on-board observers, the discrepancy between takes reported by fishermen and observers was as high as 2,100%, with a mean discrepancy of 600%. Despite this knowledge, NMFS has not enforced its own regulations sufficiently to encourage compliance. In fact, there seems to be an increasing degree of non-compliance in many areas as the exemption program continues.

The NMFS needs to have authority to mandate observers aboard all vessels and to mandate periodic and frequent submissions of logbooks by all fisheries (perhaps quarterly). It should enforce these requirements to the fullest extent of the law. Consideration should be given to a "traffic ticket" type of enforcement for minor violations such as failure to fill out the logbook daily. Vessels which fail to register should be prohibited from fishing with large mandatory penalties meted out for failure to comply. A monitoring program which will track lethal takes, and an enforcement program to ensure compliance with regulations and quotas, are critical parts of making any protective regime equitable and operable, and should be in place as an initial phase of the program.

For these reasons, we believe that the MMPA should be amended to provide for strict and mandatory enforcement and penalities to ensure compliance with all portion of the Act, and its regulations, which pertain to such issues as registration, and monitoring of catch and quotas.

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6. Reduction of inequities in the permitting process that may result in unnecessary deaths of marine mammals.

In order to protect marine mammals, we must monitor marine mammal stocks and restrict activities which negatively impact them. While NMFS has expanded the scope of its proposal to include recreational fishermen who sell their catch, we wish to point out that there are large numbers of non-commercial fishermen who use gear identical to that implicated in fisheries interaction. These fishermen, therefore, can also be assumed to interact with marine mammals but are not regulated in this Act. This omission results in marine mammals being taken in fishing operations outside of the jurisdiction of the provisions of this proposal. Non-commercial fisheries (e.g., fishermen setting nets to catch bait fish and fishermen setting nets to catch fish for consumption by friends and family) often use gear types which are known to interact frequently with marine mammals (eg. gill nets). These non-commercial fisheries should be required to register along with commercial fishermen who use the same gear type and sell their catch. This not only brings them under the same strictures and monitoring as commercial fisheries, but also adds funds to the NMFS program budget through the thousands of added registrations.

We are equally distressed that "experimental" fisheries are assumed not to take marine mammals before proving that this is the case. In fact, most "experiments" are new only because they target new species of fish. Generally, these experiments are use known methods, rather than novel gear types or unique techniques. Therefore, we can usually predict the approximate likelihood of interacting with marine mammals. In the past, these fisheries have been given a great deal of latitude and have not been subject to rigorous monitoring. We believe that, instead, they should be treated with the same degree of monitoring as any fishery which can be presumed to interact with marine mammals to a significant degree. Only if the fishery proved that it did not have an interaction problem, should monitoring be decreased.

The NMFS proposal allows fisheries to apply for and receive permits to kill marine mammals with greater ease than researchers can apply for and receive permits to study marine mammals. This inequity should be corrected by making it more difficult to obtain permits for lethal takes of marine mammals.

For these reasons, we believe that the MMPA should be amended to reduce inequities in the permitting process that may result in unnecessary deaths of marine mammals.

CONCLUSION

Once again, I would like to thank you for the opportunity to address the Subcommittee with our concerns. I would like to close by emphasizing that killing marine mammals has not, and will not, solve any fishery interaction conflicts. In fact, management of marine mammals based on high rates of incidental death is contrary to supporting a viable and productive commercial fishing resource. Further, efforts to self-regulate this industry have been a virtual failure. Therefore, we implore Congress to reauthorize a strong MMPA which includes reasonable regulation of the fishing industry, based on an equitable management scheme that is fishery-specific and includes research into mitigating measures, reduction of take toward zero, and stringent enforcement to ensure compliance. The IWC, HSUS and API believe that this approach will provide for the recovery of marine mammals and wise conservation of marine resources, and is in keeping with the spirit and intent of the MMPA.

Thank you for this opportunity to express our views. We are prepared to assist in anyway to improve this critical situation.

Interactions Between Marine Mammals & Commercial Fisheries in the Gulf of Maine

Testimony Before:
Subcommittee on Environment & Natural Resources

Congressman Gerry E. Studds
Chairman

20 April 1993

Andrew J. Read, Ph.D.
Woods Hole Oceanographic Institution

Woods Hole, Massachusetts 02543—Phone 508 457 2000—Telex 951679

I would like to thank the Chairman of the Subcommittee on Environment and Natural Resources for inviting me to present my views on the management of interactions between commercial fisheries and marine mammals. Clearly this is the most contentious and complex issue facing Congress as it considers the reauthorization of the Marine Mammal Protection Act this year. In my work as a biologist, I have studied conflicts between marine mammals and commercial fisheries for over a decade in the United States, Canada, and Latin America. I received my Ph.D. in 1989 for research on incidental catches and life history of harbour porpoises and I am continuing this work in my current position at the Woods Hole Oceanographic Institution.

We have several important conflicts between marine mammals and commercial fisheries in the Northeast. Foremost among these is the incidental take of harbour porpoises in sink gill nets in the Gulf of Maine, which I will discuss in some detail. In addition to this problem, we also have a significant incidental catch of offshore dolphins in the swordfish drift net fishery and continuing interactions between the endangered North Atlantic right whale and fixed fishing gear. These two latter situations exemplify some of the difficult issues facing you as you consider reauthorization of the MMPA. In the drift net by-catch we have uncontrolled takes from populations for which we have little or no information on abundance or status. In right whale entanglements we face a highly endangered population of whales, for which even a single mortality may have serious consequences.

The most serious issue that we face, however, is the incidental take of harbour porpoises in groundfish sink gill nets. In the five years that has elapsed since the start of the Interim Exemption Program in 1988, we have greatly increased our knowledge of the scope of this interaction and of the potential effect of incidental catches on the harbour porpoise population. Our present understanding is that the current incidental is unsustainable. NMFS has proposed listing this population as "Threatened" under the Endangered Species Act due, primarily, to the high incidental catches in the Gulf of Maine sink gill net fishery.

In general, I support the concepts contained within the NMFS proposal; clearly it is time to institute some type of long-term management system to deal with these conflicts. We cannot let the Interim Exemption expire without some framework to replace it, because many fisheries, including some in the Gulf of Maine, will not be able to obtain incidental take permits or small take exemptions, and thus would be forced to close. In addition, we should not extend the Interim Exemption, because of the limited protection for marine mammal populations contained within its regulations.

The NMFS Proposed Regime maintains the Zero Mortality Goal as originally described in the MMPA of 1972. This is an important objective that drives management to reduce incidental mortality of marine mammals in all fisheries. In some cases, such as the entanglement of harbour porpoises in sink gill nets, it is unlikely that we will soon achieve this goal, but it is certainly worth striving for.

The NMFS proposal also keeps the goal of maintaining marine mammal stocks

within their Optimum Sustainable Population (OSP) range, as outlined in the original wording and subsequent interpretation of the Act. Unfortunately, OSP determinations are costly, time-consuming and, for stocks like harbour porpoises, often impossible to make. As a population biologist, I find the OSP process cumbersome and unwieldy. Fortunately, the NMFS proposal contains an alternative mechanism to estimate allowable removals for each stock, the PBR process. PBR levels are admittedly conservative, but I believe this approach is necessary because of the considerable scientific uncertainty regarding the status of many marine mammal stocks. The PBR process also circumvents many other problems faced in making OSP determinations, such as the question of whether to use current or historical carrying capacity.

The NMFS proposal will require continued monitoring of fisheries to document take levels and enforce quotas. There are several important issues here. First, it is important that NMFS should be allowed to place observers on board all vessels, except those for which safety factors preclude such monitoring. For these latter cases, remote-platform monitoring may be necessary. Without this authority, it is possible that vessels with high mammal by-catches will not be sampled in voluntary observer programs. Second, we will need to develop real-time data collection systems to improve the speed with which by-catch information can be made available to managers and the fishing industry. Third, unless significant changes are made to the logbook system, so that participants will benefit from the collection of accurate and timely data, this portion of the program should be discontinued. And finally, it is critical that NMFS maintain a flexible attitude towards enforcing quotas, should they be necessary. In complex situations such as the Gulf of Maine, where participation in the gill net fishery is seasonal and varies with region, universal quotas will not work.

The stock assessment process, as outlined in the NMFS document, should provide an adequate long-term research program for providing assessments of most marine mammal populations. Clearly lacking in the NMFS plan, however, is a similar long-range program for mitigation of incidental mortality in fishing gear. It is not enough to simply identify critical situations and expect the fishing industry to provide the solutions. NMFS should develop a gear research program that can develop and test means of reducing the number of marine mammals killed or injured in commercial fisheries. NMFS should also support outreach and education programs that are designed to increase awareness of marine mammal issues within the fishing community.

In closing, I would like to mention the Harbour Porpoise Working Group, of which I have been a member since 1990. The group is a coalition of organizations representing the fishing industry, environmental groups, scientific institutions, and government (see Attachment). Our primary goal is to find ways of reducing the incidental take of harbour porpoises in gill nets while minimizing impacts on the fishery. The group is informal, and at times raucous, but by agreeing to this common goal we have made considerable progress. In this reauthorization debate, your task is much the same as ours: to reduce the incidental catch of marine mammals while minimizing impacts on the fishing industry. I believe that a strong MMPA, incorporating the major elements of the NMFS proposal, will go a long way towards achieving this goal.

Harbor Porpoise Working Group
Action Plan

Executive Summary

The Harbor Porpoise Working Group (HPWG) is a coalition of organizations which includes representatives from the New England Aquarium, Woods Hole Oceanographic Institution, Maine Gillnetters Association, New Hampshire Commercial Fishermen's Association, Massachusetts South Shore Gillnetters Association, Canada's Grand Manan Fishermen's Association, Conservation Law Foundation, Center for Coastal Studies, University of New Hampshire Sea Grant, International Wildlife Coalition, Manomet Bird Observatory, National Marine Fisheries Service, New England Fishery Management Council and the Canadian Department of Fisheries and Oceans. Participants have agreed to the following mandate which was adopted by the group in 1991.

> ***To define the extent of the problem and identify solutions pertaining to harbor porpoise and commercial fisheries interactions in the Gulf of Maine, and more specifically, to reduce the incidental take of harbor porpoise in gillnets while minimizing impacts on the fishery.***

The HPWG has prepared an action plan which outlines strategies for mitigation, reviews relevant biological information on harbor porpoise/fishery interactions and recommends avenues for public education. Emphasis is placed, however, on two principal areas:

1) Mitigation: research on mitigation strategies is critical to the long-term health of the harbor porpoise population and the fisheries with which they interact. Although assessments of the population size and the impacts of porpoise bycatch are ongoing, no alternatives to current fishing practices have been explored. We strongly recommend that work to reduce porpoise kills in gillnets begin immediately since effective solutions will require field testing for several seasons.

2) Cooperative efforts: mitigation research must involve a consortium of fishermen, scientists, engineers, environmentalists and resource managers. To effectively provide a long-term solution, the value of diverse experience in addressing the incidental take issue is essential. We strongly recommend a multidisciplinary approach to all mitigation research concerning harbor porpoise/fishery interactions.

The HPWG believes these recommendations reflect the intent of Section 111 of the Marine Mammal Protection Act which authorizes the Secretary of Commerce to undertake a program of research and development for the purpose of devising improved fishing methods and gear in order to reduce the incidental taking of marine mammals in commercial fishing operations.

Mitigation

The HPWG has concluded that regardless of the size of the harbor porpoise population in the Gulf of Maine, it is a desirable goal to reduce the take at this time. Various measures may contribute to that end and include the following actions:

- Review the worldwide literature base dealing with marine mammal/fishing gear interactions to identify potential measures which could mitigate harbor porpoise take.

- Review and summarize NMFS data collected through its sea sampling program.

The following mitigation options should be explored fully to determine the most effective means of reducing harbor porpoise/fishery interactions in the Gulf of Maine:

- Determine seasonal and geographic patterns of harbor porpoise interactions with sink gillnets to develop mitigation strategies.

- Gear Modification - conduct gear field trials to evaluate gear design and strategy adjustments, alternative gears, behavioral factors, which predispose cetaceans to entanglement and environmental and ecological factors influencing entrapment-related behavior.

- Gear Assessment - examine the technical, economic, ecological and social benefits and impacts on fishery resources relative to gillnets and other gear types that target groundfish.

- Area Closures - evaluate the use of closed areas when harbor porpoise are known to be present.

- Gillnet modification - undertake a series of field trials to test the effects of various gillnet modifications and operational strategies on fish catch and harbor porpoise take.

- Perform tank tests of scaled gillnet models to support the field work.

- Initiate research to assess the behavioral factors that predispose harbor porpoise to entanglement, including those immediately prior to encounters with nets and escape responses.

Biology

Despite the considerable body of knowledge available on harbor porpoise, significant information gaps exist which hinder efforts to assess fishery interactions. The HPWG supports the following avenues of research:

- Develop more accurate population estimates to determine the impact of incidental catches of harbor porpoise in the sink gillnet fishery.

- Develop more accurate estimates of the number of harbor porpoises killed in sink gillnets to assess the impact of these kills on the population.

- Resolve uncertainties in the methods and data used to estimate total effort in the sink gillnet fishery.

- Conduct research on harbor porpoise abundance and bycatch in Canadian waters.

- Initiate more studies on diet, reproduction and natural mortality, in addition to stock structure and the potential for population growth, to determine harbor porpoise capacity to withstand mortality in the sink gillnet fishery.

Information and Education

Information and education efforts are key to resolving issues related to marine mammal/fishery interactions. To arrive at equitable solutions the HPWG recommends:

- The exchange of accurate information between scientists, fishermen, government agencies and the general public.

- Initiatives by the National Marine Fisheries Service and the fishing community to encourage fishermen to seek practical solutions to these problems.

- Coordination with Canadian efforts to address and/or assess harbor porpoise/commercial fisheries interactions.

- Development and dissemination of educational materials related to the incidental take of harbor porpoise in commercial fishing operations.

TESTIMONY OF ALVIN D. OSTERBACK
BEFORE THE HOUSE SUBCOMMITTEE ON ENVIRONMENT
AND NATURAL RESOURCES REGARDING THE
REAUTHORIZATION OF MARINE MAMMAL PROTECTION ACT
APRIL 20,1993

MR. CHAIRMAN, MY NAME IS ALVIN D. OSTERBACK AND I AM HERE TODAY REPRESENTING THE ALEUTIANS EAST BOROUGH, ITS COMMUNITIES AND THE FISHERMEN OF OUR REGION.

FOR THOSE OF YOU WHO DON'T KNOW WHERE WE ARE, THE ALEUTIANS EAST IS LOCATED IN THE FAR WEST PORTION OF THE ALASKA PENINSULA AND THE EASTERN MOST ISLANDS OF THE ALEUTIANS. THE RESIDENTS ARE PRIMARILY OF ALEUT DESCENT, WHO HAVE LIVED IN THE ALEUTIANS EAST REGION FOR THOUSANDS OF YEARS. WE HAVE MADE THE DIFFICULT TRANSITION FROM A SUBSISTENCE TO A COMMERCIAL LIFESTYLE. OUR FISHERMEN OPERATE A SMALL BOAT FLEET TO FISH FOR SALMON, COD, HALIBUT, HERRING, CRAB AND ROCKFISH. OUR COMMUNITIES ARE SOLELY DEPENDENT ON FISHING FOR EMPLOYMENT AND FISHING PROVIDES OUR TAX BASE. WITHOUT THE ABILITY TO CONTINUE OUR COMMERCIAL FISHERIES, WE WOULD BE FORCED BACK TO A SUBSISTENCE CULTURE WITH NO OPPORTUNITY FOR OTHER EMPLOYMENT. SOME OF MY COMMUNITIES WOULD NOT SURVIVE, AND WOULD JOIN THE LIST OF GHOST TOWNS THAT ALREADY DOT THE SOUTHWEST ALASKAN COAST.

OUR ECONOMIC SURVIVAL HAS REQUIRED THE ALEUTIANS EAST AND ITS FISHERMEN TO BECOME ACTIVE PARTICIPANTS IN DISCUSSIONS OVER THE MMPA, SPECIFICALLY, AUTHORIZATION FOR THE INCIDENTAL TAKE OF MARINE MAMMALS IN COMMERCIAL FISHERIES. WE ARE AT RISK BECAUSE WE ARE

LOCATED NEAR THREATENED STELLER SEA LION ROOKERIES. ADDITIONALLY, SCIENTISTS HAVE BECOME CONCERNED ABOUT THE STATUS OF DECLINING HARBOR SEAL POPULATIONS IN SOUTHWEST AND WESTERN ALASKA.

THE ALEUTIANS EAST BOROUGH AND ITS ALASKA NATIVE FISHERMEN WANT TO BE ACTIVE PARTICIPANTS IN ALL FUTURE EFFORTS TO MITIGATE IMPACTS ON MARINE MAMMAL STOCKS IN SERIOUS TROUBLE. ALL TOO OFTEN WE HAVE BEEN BLINDSIDED BY REGULATORY INITIATIVES AIMED AT US BECAUSE WE ARE THE MOST VISIBLE HUMAN PRESENCE IN THE REGION.

FOR EXAMPLE, THE ALASKA PENINSULA DRIFT GILLENT AND SEINE FLEETS WERE CLASSIFIED AS CATEGORY 1 FISHERIES IN 1988 BASED ON HIGHLY SPECULATIVE INFORMATION THAT THERE WAS A HIGH LEVEL OF MARINE MAMMAL TAKES BY OUR FLEETS. WHAT WE FOUND, HOWEVER, WHEN WE INVITED OBSERVERS ON OUR BOATS, WAS THAT THERE ARE VIRTUALLY NO LETHAL TAKES OF MARINE MAMMALS IN OUR FISHERIES. OUR FLEETS WERE THEN REMOVED FROM THE CATEGORY 1 LIST AND PLACED IN CATEGORY 2.

IF THERE IS A PROBLEM WITH MARINE MAMMALS IN OUR REGION, WE WANT TO BE PART OF THE SOLUTION. WE ACCEPT THE NEED FOR REASONABLE REGULATION OF COMMERCIAL FISHERIES IN SO-CALLED "HOT SPOT" SITUATIONS, MEANING FISHERY/MAMMAL INTERACTIONS AT SIGNIFICANT LEVELS WHEN THE SPECIES IS IN DECLINE OR FOR WHICH ITS STATUS IS UNKNOWN. UNFORTUNATELY I CANNOT GIVE YOU ANY SPECIFIC LEGISLATIVE RECOMMENDATIONS AT THIS TIME. I AM PART OF THE NEGOTIATING TEAM COMPRISING THE FISHING INDUSTRY, ENVIRONMENTAL GROUPS AND THE GOVERNMENT TO DEVELOP A PROPOSAL FOR THE CONGRESS. WE HAVE AGREED IN GOOD FAITH TO HOLD OFF PROMOTING ANY SPECIFIC PROPOSAL

UNTIL THE GROUP IS FINISHED WITH ITS DISCUSSIONS.

WHAT I CAN DO, HOWEVER, IS TO APPEAL TO YOU TO ACT QUICKLY ON THIS ISSUE. WE RUN THE RISK OF HAVING FISHERIES SHUT DOWN ON A NATIONWIDE BASIS IF CONGRESS DOESN'T ACT BY OCTOBER 1, 1993. MY COMMUNITIES AND OUR FISHING INDUSTRY COULD CONCEIVABLY GRIND TO A HALT. WE JUST CANNOT AFFORD TO SIT OUT OUR FISHING SEASONS WAITING FOR THE CONGRESS TO FINISH THE LEGISLATION.

IN ORDER TO HELP YOU MEET THIS TIME FRAME, OUR NEGOTIATING GROUP HAS PUT THE DISCUSSIONS ON A FAST TRACK. OUR GOAL IS TO HAVE A PROPOSAL TO YOU IN THE FIRST WEEK OF JUNE.

IT IS MY BELIEF THAT THE NEGOTIATING GROUP WILL SUCCEED IN NARROWING THE RANGE OF ISSUES FOR THIS SUBCOMMITTEE TO CONSIDER. IF WE CANNOT COME TO A CONSENSUS ON AN ENTIRE PACKAGE, THE CONGRESS MUST TAKE THE ISSUES REMAINING IN DISPUTE AND SETTLE THEM AS PART OF THIS YEAR'S LEGISLATIVE PROCESS. IF OUR NEGOTIATING GROUP CANNOT COME TO GRIPS WITH THESE ISSUES IN THE TIME FRAME WE HAVE SET OUT FOR OURSELVES, IT IS NOT LIKELY THAT MORE TIME WOULD RESOLVE OUR DIFFERENCE.

THANK YOU FOR GIVING ME AN OPPORTUNITY TO TESTIFY ON AN ISSUE OF CRITICAL IMPORTANCE TO THE ECONOMIC SURVIVAL OF MY REGION.

TESTIMONY OF

GUY N. THORNBURGH
PACIFIC STATES MARINE FISHERIES COMMISSION

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENT
AND NATURAL RESOURCES

ON

REAUTHORIZATION OF THE
MARINE MAMMAL PROTECTION ACT

APRIL 20, 1993

I am Guy Thornburgh, Executive Director of the Pacific States Marine Fisheries Commission. I represent the interests of commercial, sport-charter, recreational and tribal fisheries of California, Oregon, Washington and Idaho. Diverse groups such as Trout Unlimited, Pacific Coast Federation of Fishermen's Associations, Northwest Indian Fisheries Commission, Pacific Coast Fisheries Legislative Task Force and Washington Department of Fisheries (to illustrate just a few) all share a common interest in changes to the Marine Mammal Protection Act.

We appreciate the opportunity to comment again on this statute...Again, because in 1973, 1975, 1976, 1977, 1978, 1980 and 1987 we put into record our sincere concerns for obvious and inevitable conflicts that arise from a law that protects one component of the ecosystem (i.e. marine mammals) in the presence of man's conservation and wise use of other components (e.g. fisheries) (see attached resolutions).

Much of the public has serious misconceptions of: a) the status of marine mammal populations along the west coast; b) the impact of commercial and tribal fisheries on mammals; and c) the impact of marine mammals on fisheries (including recreational fisheries). *The facts are that most mammal populations of our west coast are NOT depressed; the fisheries are NOT jeopardizing the well being of the mammal populations; and many fisheries now are negatively impacted by abundant populations of mammals.*

Status of Mammals

The gray whale was recently removed from the ESA list "...based on evidence showing that this stock has recovered to near its estimated original population size...". Gray whales are fully recovered from the tragic hunting practices of our ancestors. Northern elephant seal and California harbor porpoise are well within their Optimum Sustainable Population (OSP) ranges. The Southern sea otter population is growing at a healthy 6-8 percent per year. California sea lions have exploded to more than 110,000 animals, are increasing at 5-10 percent per year, and

have expanded beyond their historic range into previously unoccupied habitat. Harbor seals are packing bays and estuaries of Washington and Oregon while continuing to increase at 6-10 percent per year. The common dolphin is so common that its population off California now exceeds 270,000 animals.

These populations are robust in spite of the presence of tens of thousands of commercial fisherman and millions of marine recreational fishermen. Fishing on the West Coast is **NOT** preventing the growth of marine mammal populations.

Symptoms

The symptoms of this increasing abundance of mammals are reflected by the following:

- Sport charter boats have been forced to abandon traditional fishing grounds because California sea lions take more fish from the lines than clients can reel in.

- Docks are overrun by lounging animals, even to the point of damaging facilities such as the new floating pier at Charleston, Oregon.

- Recreational fishermen in bays of southwest Washington lose up to 60 percent of troll-hooked fish to harbor seals, yet they are prohibited by law from using non-lethal deterrents.

- In Bellingham Bay drift gillnet and set net fishermen are losing 30 to 50 percent of their fall chinook salmon catch to harbor seals.

- Sea lions feed on precious wild stocks of steelhead and chum salmon 40 miles up the Nisqually River.

- Scientists on the Recovery Team for the threatened and endangered Columbia River salmon now ask if the hoards of harbor seals at the mouth of the Columbia are impacting these critical runs. (Note: Anthropologist Franz Boas, who did ground breaking fieldwork among Native Americans of the Northwest Coast in the late 19th century witnessed "drives to capture and harpoon sea lions down to the sea". The purpose of such seal drives was to prevent these aquatic carnivores from interfering with Indian fishing efforts during the annual salmon runs, which were their primary source of food.)

- Beginning in 1991 urban sport fishermen began to interact with California sea lions 26 miles up the Willamette River, a tributary of the Columbia River and about 125 miles upstream from the ocean.

- In 1990, NMFS scientists documented that an estimated 40 to 50 percent of the observed adult spring chinook salmon ascending the fish ladder at Lower Granite Dam (Columbia River) had teeth marks and scars caused by either harbor seals or California sea lions. The number of fish that did not escape their predators is not known.

- Harbor seal numbers are so dense in southern Puget Sound that their feces have contaminated shellfish growing beds. The Washington Department of Health has been forced to close sites in Dosewallips State Park to shellfish harvesting for the protection of public health.

- California nearshore gillnet fisheries for halibut and sea bass suffer up to 80 percent loss of catch in some areas during certain seasons, as harbor seals strip fish from nets.

- In California, and increasingly in Washington, sea otters are eliminating harvestable shellfish resources upon which people also rely (clams, crabs, abalone and sea urchins). Without long-term zonal management (zones for otters and zones for people) the West Coast will find itself without shellfish fisheries (The sea urchin fishery in California alone is an $80 million export to Japan!).

- At the mouth of the Elwha River in the Strait of Juan de Fuca, tribal gillnet and set net fishermen have lost 30-50 percent of their fall chinook catch to harbor seals. Also, non-Indian sport fishermen report big populations of harbor seals taking large chinook from their lines.

- Finally, it would be remiss to not mention the infamous "Herschel" at the Ballard Locks in Seattle, where California sea lions have nearly succeeded (and likely will) in annihilating a native run of wild steelhead.

The Cause of These Problems

These problems result because society has so feverishly embraced "protectionism" as the goal of the Act, implementation of the statute has turned away from reality. Have we not learned from federal "protection" of elk in Yellowstone National Park, with its resultant impact on the habitat? (Professional hunters are now hired to relieve the strain of overpopulation.) Have not we learned from the federal protection of wild horses, with its corresponding impact on range lands? (Adoption programs are required to help thin the herds. Imagine, if you can, an adoption program for sea lions!) Two decades of marine mammal protection have successfully rebuilt marine mammal stocks along the West Coast, but symptoms of this unilateral protection now show that the "roof is beginning to leak".

Implementation of the Act is deliberately and unrealistically lopsided toward pure protectionism. For example, why have so few populations been listed at OSP? (Only 6 of 64 stocks listed in the NMFS proposed regime are declared to be at OSP.) Any reasonable wildlife manager would intuitively (if not statistically) conclude that both gray whales and California sea lions are obviously within their OSP, yet the government has failed to declare them so. (Recall that NMFS has stated that the gray whale population has recovered to near its estimated original population size, and recent NMFS studies indicate that the present abundance of California sea lions may be higher than any historical level.). Could special interests fear that if marine mammal populations are at OSP, the exemption on takes will be waived and therefore create an opportunity to <u>manage</u> these animals?

Why is the Act's definition of "harass" implemented by regulations that include deterrence as a form of harassment? Why should a citizen need to secure some permit from the federal government to scare a mammal away from a sportfishing boat? Should a government agent be the only person with authority to chase mammals away from docks, ferry terminals, net pens, locks, dams, etc.?

Why has no state agency accepted management authority as provided in Section 109 (except for walrus in Alaska between 1976-1979, whereupon the state declined the authority they had recently received)? Even though the Act was amended in 1981 to streamline the process of transferring management to the states, no West Coast state intends to request the authority. Federal standards are still too burdensome, too costly, and too restrictive of management options.

Why has the Marine Mammal Commission argued for "historic" carrying capacity (a key component of determining OSP and interpreting ecosystem balance). This presumes an environment that existed before man began using components of the ecosystem, such as fish, for human food. The use of historic rather than current carrying capacity jeopardizes fisheries, zonal management of mammals, and in general the goal of incorporating consumptive human uses into ecosystem management.

What has NMFS tried to gain by regulating against the feeding of marine mammals (arguing it is an illegal "take") and why have they attempted to curtail "whale watching" activities? Would not their limited resources be better focused on mammal populations that are precariously declining -- before those populations are listed under the Endangered Species Act?

Why doesn't the Administration assert itself as manager of the Nation's living marine resources and propose legislative solutions to the symptoms and problems? To date they have responded to the single issue of interaction between commercial fisheries and mammals (as required by Section 114(l)(3) of the 1988 amendment) with a bureaucratic nightmare that throws a significant number of fishermen (far more than the current Interim Exemption Program) into permits, fees, quotas, allocations, excessive monitoring and less deterrence.

They have proposed no solution to the growing conflicts with robust populations. In fact, they have left commercial fishermen with the burden of trying to "manage" these increasing populations. In its April 1992 Report to Congress on Washington State Marine Mammals, NMFS states "Although several studies (Beach et al. 1985, Gearin et al. 1988b) have recommended NMFS consider taking actions to resolve marine mammals/fisheries conflicts, NMFS believes that, at this time, the methods available to commercial fishermen to deter marine mammals are the most cost effective approach." Fishermen, however, face severe penalties for violating the take provisions of the Act. It appears government is neglecting some of its management responsibility.

Solutions

Our West Coast fisheries entities (state, commercial, recreational, tribal, and sport charter) are not so naive to expect an immediate leap toward treatment of marine mammals similar to other wildlife. However, we do look for a sign from Congress --- one which acknowledges that the two decades of protection along the West Coast have gone a long way to restore marine mammal populations, and which recognizes that the growing conflicts between coastal people and marine mammals need legislative attention.

We suggest the following:

- Provide incentives for the states of California, Oregon, Washington and Alaska to accept a role in research and management of marine mammals by further streamlining and relaxing the provisions of Section 109.

- Acknowledge that nothing in the Act is intended to abrogate or diminish existing Native treaty rights. Tribes of Washington, for example, are entitled to and wish to co-manage mammals with NMFS and the state.

- Allow, without permits, citizen deterrence of mammals (chasing a deer away from a picnic table is not harassing the animal and the same principle should apply to marine mammals for tourists, dock owners, sport fishermen, ferry workers, etc.)

- Allow government officials the right to lethally remove nuisance animals that severely impact other valuable natural resources.

- Allow commercial fishermen to take from "depleted" stocks and to protect their gear and catch via any means from mammal stocks that are not threatened or endangered.

- Focus fiscal resources on stocks of mammals that appear likely to slip towards listing under ESA.

- Acknowledge an ecosystem management program which gives equal and balanced consideration to all components of the ecosystem including fishery resources, marine mammals populations and the socio-economic factors affecting this system.

Conclusion

The fishery interests of the West Coast face the unique situation of burgeoning marine mammal populations which increasingly interact with man. We all know about the ongoing "negotiations" between the fishing community and the environmental community. Please tell us today that you want us to address the real issues of the next decade, which include not only the "hot spots" of declining populations but also the excesses of abundant populations. Tell us you wish to see a progressive compromise which begins to acknowledge the success of two decades of protection, but at the same time will lead to a sustainable ecosystem managed for both the aesthetics of marine mammals and man's interaction with the sea.

PACIFIC MARINE FISHERIES COMMISSION RESOLUTION NO. 4

SUPPORT H.R. 16043 TO EXTEND INCIDENTAL TAKE
OF MARINE MAMMALS FOR TWO YEARS

WHEREAS, the commercial fish harvest of the States of Alaska, Washington, Oregon, and California is annually valued in excess of 750 million dollars;

WHEREAS, in the course of commercial fishing operations, marine mammals may be taken incidentally; and

WHEREAS, marine mammals frequently destroy fishing gear and take fish from the fishermen's gear to the detriment of the fishermen's income; and

WHEREAS, the Marine Mammal Act of 1972 jeopardizes the future of segments of the United States commercial fishing industry and the Endangered Species Act of 1974 eliminates the need for this Marine Mammal Protection Act; and

WHEREAS, members of the Pacific Marine Fisheries Commission believe that the commercial fishing industry should not be penalized as a result of the incidental taking of marine mammals in the course of fishing; and

WHEREAS, H.R. 16043 was introduced on July 22, 1974 in the House of Representatives calling for an additional 2-year extension of the moratorium;

NOW BE IT THEREFORE RESOLVED, that the Pacific Marine Fisheries Commission support and encourage the passage of H.R. 16043; and

BE IT FURTHER RESOLVED, that the Pacific Marine Fisheries Commission urges the Congress to repeal the Marine Mammal Protection Act and encourage the Secretaries of Interior and Commerce to cooperate with coastal states in protecting endangered marine mammals through the provisions of the Endangered Species Act of 1973.

Adopted in Anchorage, Alaska, October 10, 1974 by unanimous approval of the five Compact States, Alaska, California, Idaho, Oregon, and Washington.

PACIFIC MARINE FISHERIES COMMISSION RESOLUTION NO. 11

AMEND THE MARINE MAMMAL PROTECTION ACT

WHEREAS, the Marine Mammal Protection Act was enacted because of Congressional concern for the status of certain species of marine mammals; and

WHEREAS, the wording of Section 109 of the Marine Mammal Act does not require expeditious review and disposition of management programs submitted by the states to the Federal Government; and

WHEREAS, procedures developed under the framework of the Act do not permit any state marine mammal program to be implemented, in the absence of statutory authority to protect all marine mammals; and

WHEREAS, the "moratorium" on taking of marine mammals as defined in Section 101 prohibits consideration of the total ecosystem in the utilization and wise management of fishery resources; and

WHEREAS, the definition of some terms including "take (harass)", "moratorium", and "depletion" provide unrealistic restrictions on responsible management of the nation's living marine resources including marine mammals; and

WHEREAS, the Act should provide for more realistic consideration of the incidental take of marine mammals in commercial fishing operations to avert the collapse of major U.S. fisheries; and

WHEREAS, all the foregoing provisions will assist in the furtherance of the objectives of the Act;

NOW BE IT THEREFORE RESOLVED, that the Pacific Marine Fisheries Commission urges Congress to amend the Marine Mammal Protection Act to require that programs submitted by states to manage their marine mammals be acted upon within 120 days in a manner consistent with requirements of Section 6 of the Endangered Species Act of 1973, so that the Act encourages the return of management responsibility to the states; and

BE IT FURTHER RESOLVED, that the terms "depletion", "moratorium", and "take (harassment)" be redefined so that state and federal agencies can consider all animals in the marine ecosystem when managing the ocean's fishery resources; and

BE IT FURTHER RESOLVED, that the Act be amended to permit states to submit management programs for any individual marine mammal species for which they have statutory responsibility;

BE IT LASTLY RESOLVED, that the Marine Mammal Protection Act be amended so that the goal of reducing mammal mortality incidental to commercial fishing be defined in more practicable and realistic terms.

Adopted in San Diego, California, November 13, 1975 by unanimous approval of the five Compact States, Alaska, California, Idaho, Oregon, and Washington.

Pacific Marine Fisheries Commission's 1976 Resolution 10, with notes of subsequent implementing actions. This Resolution was adopted unanimously by the five compact States of Alaska, California, Idaho, Oregon, and Washington November 18, 1976.

10. Amend the Marine Mammal Protection Act of 1972

WHEREAS, the Marine Mammal Protection Act of 1972 was enacted because of Congressional concern for marine mammals; and

WHEREAS, it was not Congressional intent that implementation of the Act should unnecessarily impede rational management of marine resources by the States; and

WHEREAS, protection of all marine mammals under the Act has caused a redistribution of some species to the detriment of other resources; and

WHEREAS, adequate biologic, sociologic, and economic data do not exist to properly evaluate the effect of implementation of the Marine Mammal Protection Act upon fishery resources; and

WHEREAS, the National Marine Fisheries Service is interpreting the Act to mean nearly total protection for marine mammal species; and

WHEREAS, this strict interpretation of the Act has been extended to cover even basic biologic and ecologic research on many important marine mammals, thus making it difficult for sponsible agencies to conduct the studies required for improved management of the affected ecosystems;'

NOW BE IT THEREFORE RESOLVED, that the Pacific Marine Fisheries Commission strongly reaffirms its recommendations in 1975 Resolution 11 that the Marine Mammal Protection Act be amended to redefine terms and definitions to permit an ecosystem approach to marine resource management' and to return management responsibilities to the States where requested as quickly as possible; and

BE IT FURTHER RESOLVED, that the Act be revised and interpreted to encourage the States and other competent research entities to conduct biologic, ecologic, and economic studies to evaluate the impacts of the Act upon the ecosystems affected and upon the conservation and utilization of the total resources of those ecosystems; and

BE IT FURTHER RESOLVED, that Congress appropriate adequate funds to contract for these studies through the appropriate management body.

Adopted unanimously by the five Compact States

Action: This Resolution was the third adopted during the past three years by PMFC on the Marine Mammal Protection Act of 1972 (MMPA) The 1974 Resolution, No 4, supported a 2-year extension of a moratorium to allow the incidental taking marine mammals during commercial fishing. It also urged peal of MMPA and cooperation with coastal States in protecting marine mamals through provisions of the Endangered Species Act of 1973. The 1975 Resolution, No. 11, urged amendment of MMPA to encourage the return of management responsibilities to the States, and to revise definitions so state and federal agencies may manage all animals in the marine ecosystem.

In soliciting actions in support of these Resolutions, PMFC stressed the logic of managing ecosystems on a scientific basis rather than totally protecting selected predators (manne mammals) while intensively harvesting their prey (fish and shellfish)

Representatives of PMFC on December 2, 1976 participated in a National Fisheries Policy Conference in Washington, D.C. The Conference endorsed the following Policy Statement:

"The Marine Mammal Protection Act of 1972 as presently written, and as has been interpreted by the court, presents great difficulty and concern to the United States fisheries The policy and principle upon which the Act is based appear to be in conflict with the sound policies of resource management and maintenance of the health and stability of the marine ecosystem which were recognized by Congress in the enactment of the Fishery Conservation and Management Act of 1976.

"The National Fisheries Policy Conference sees the possibility of growing conflict between manne mammals, fishery stocks, and man, with the ecosystem and, therefore, suggests that a sound, comprehensive resource management program must exist which gives equal and balanced consideration to all components of the ecosystem including fishery resources, marine mammal populations, and the socio-economic factors affecting this system The increasing food requirements of the human population necessitate an enhanced use of the ocean as a source of protein for man and, thus, substantiate the need to manage the entire ecosystem in a rational and efficient manner.

"Participants of the National Fisheries Policy Conference endorse the need for amendatory legislation to bring the concept of conservation, development and utilization of fishery resources within the framework of the objectives of the Marine Mammal Protection Act Efforts to this end have the support of the Conference."

Based upon this policy statement the Fishery Affairs Office of the National Canners Association along with other representatives of the fishing industry in 1977 began drafting alternative approaches to amendment of the MMPA. PMFC maintains an active liaison with that Office on this project.

The MMPA was a matter of considerable concern to Pacific Coast participants in the Eastland Fisheries Surveys. In summary the participants said Congress should amend MMPA to allow rational management of marine mammal populations as integral segments of the marine ecosystem to make possible, where necessary, the prevention of overpopulation of marine mammals with resultant deleterious effects on economically important species upon which they feed.

PACIFIC MARINE FISHERIES COMMISSION RESOLUTION NO. 9

MANAGE MARINE MAMMALS FOR CONSERVATION, DEVELOPMENT AND UTILIZATION OF FISHERY RESOURCES

WHEREAS, the Marine Mammal Protection Act of 1972 as presently written, and as has been interpreted by the court, presents great difficulty and concern to the United States fisheries; and

WHEREAS, the policy and principle upon which the Act is based appear to be in conflict with the sound policies of resource management and maintenance of the health and stability of the marine ecosystem which was recognized by Congress in the enactment of the Fishery Conservation and Management Act of 1976; and

WHEREAS, the Pacific Marine Fisheries Commission, sees the possibility of growing conflict between marine mammals, fishery stocks, and man, with the ecosystem; and

WHEREAS, a sound, comprehensive resource management program must exist which gives equal and balanced consideration to all components of the ecosystem including fishery resources, marine mammal populations, and the socio-economic factors affecting this system; and

WHEREAS, the increasing food requirements of the human population necessitate an enhanced use of the ocean as a source of protein for man and, thus, substantiate the need to manage the entire ecosystem in a rational and efficient manner;

NOW BE IT THEREFORE RESOLVED, that the Pacific Marine Fisheries Commission reaffirms its resolutions of 1975 and 1976 and urges Congress to amend the marine Mammal Protection Act to bring the objective of the Act within the framework of the concept of conservation, development and utilization of fishery resources, and facilitate return to the States of marine mammal management within the limits of state jurisdiction.

Adopted at Portland, Oregon, November 10, 1977 by unanimous approval of the five Compact States: Alaska, California, Idaho, Oregon, and Washington

PACIFIC MARINE FISHERIES COMMISSION RESOLUTION NO. 10

SEAL AND SEA LION IMPACT ON SALMON AND STEELHEAD IN INLAND WATERS

WHEREAS, under the moratorium imposed by the Marine Mammal Protection Act, seal and sea lion numbers have increased in some rivers, bays and estuaries of the Pacific Coast and the Act makes it illegal to control or harass these animals; and

WHEREAS, salmon and steelhead that have been injured or killed by seals and sea lions which are appearing in increasing numbers in commercial and recreational fisheries; and

WHEREAS, the monetary value of salmon has risen sharply in recent years, resulting in a more serious economic impact on commercial fisnermen when losses to seals and sea lions occur; and

WHEREAS, studies are needed to document the impact of the increasing numbers of marine mammals on Pacific Coast fisheries; and

WHEREAS, financing of these needed studies is an appropriate federal obligation;

NOW BE IT THEREFORE RESOLVED, that the Pacific Marine Fisheries Commission requests that the necessary authority and sufficient funds be provided by the National Oceanic and Atmospheric Administration to PMFC for contract with appropriate state agencies for studies on inland salmon and steelhead waters to determine:

1. the impact of seals and sea lions on commercial and recreational fisheries, including destruction of fishing gear;
2. food habits of seals and sea lions in inland waters;
3. methods of controlling depredation;
4. modifications needed in the Marine Mammal Protection Act.

Adopted at Portland, Oregon, November 10, 1977 by unanimous approval of the five Compact States: Alaska, California, Idaho, Oregon, and Washington

PACIFIC STATES MARINE FISHERIES COMMISSSION, 1978

10. State Management of Marine Mammals within State Waters

WHEREAS, marine mammals and marine fishes are both integral parts of the marine ecosystem; and

WHEREAS, effective management of marine fisheries entails consideration of individual species within the total ecosystem including the food chain and predator-prey relationships; and

WHEREAS, Congress passed the Marine Mammal Protection Act of 1972, designating the Commerce and Interior Departments as the responsible management agencies over marine mammals; and

WHEREAS, separate management authorities over marine mammals and marine fishes precludes effective management; and

WHEREAS, state agencies have expertise regarding local fish and marine mammal populations and can best prescribe those management measures necessary for marine mammals in state waters; and

WHEREAS, most marine mammals are neither threatened nor endangered; and

WHEREAS, fisheries for such animals as abalone and clams have been reduced or eliminated by populations of marine mammals while other fisheries such as salmon are suffering from marine mammal predation and the situation will worsen unless coordinated management and control of marine mammals are forthcoming;

NOW THEREFORE BE IT RESOLVED, that the Pacific Marine Fisheries Commission urges the Congress of the United States to amend, at the earliest opportunity, the Marine Mammal Protection Act of 1972, returning to the States management authority over marine mammals within state waters.

Adopted unanimously by the five Compact States: Alaska, California, Idaho, Oregon and Washington.

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5. Removal of Inconsistencies and Clarification of Intent in Federal Laws Governing Conservation and Management of Living Marine Resources

WHEREAS, the Fishery Conservation and Management Act of 1976 (FCMA), laid the foundation for a new era of regional fishery conservation and management, predicated upon new National Standards which require consideration of socioeconomic as well as biological factors in management planning; and

WHEREAS, those National Standards also require that fishery conservation and management measures shall, where practicable, "promote efficiency in the utilization of fishery resources"; and "minimize costs and avoid unnecessary duplication"; and

WHEREAS, four years of experience in implementation of FCMA clearly demonstrate that certain fundamental inconsistencies with other Federal laws seriously impede achievement of either biological or socioeconomic standards set by FCMA; and, that in some instances the intent of Congress needs clarification to assure its proper interpretation in administrative practice;

THEREFORE BE IT RESOLVED, that the Pacific Marine Fisheries Commission requests appropriate Congressional oversight Committees to seek advice from the coastal States, the Regional Fishery Management Councils, and the National Marine Fisheries Service as basis for prompt amendment as necessary of the Fishery Conservation and Managment Act of 1976 and other federal legislation to remove existing inconsistencies and clarify the intent of Congress. Important issues to be considered include:

1. *Ecosystem management concept of FCMA is rendered inoperable by exclusion of marine mammals from FCMA jurisdiction and by immunity from any management measures accorded marine mammals by the Marine Mammal Protection Act of 1972;*
2. *Need for improved funding procedures for foreign fishing observer programs through direct application of collected fees; and to establish Congressional intent for increased funding for data collection and management-related research required to implement National Standard 2 ("Conservation and management measures shall be based on the best scientific information available").*

Adopted unanimously by the five Compact States: Alaska, California, Idaho, Oregon, and Washington

REPORT ON PROPOSED AMENDMENTS TO THE MARINE MAMMAL PROTECTION ACT

Prepared by

PACIFIC MARINE FISHERIES COMMMISSION
AD HOC TECHNICAL COMMITTEE ON MARINE MAMMALS
Robin Brown, Chairman

December 1, 1987

PACIFIC MARINE FISHERIES COMMISSION
2000 S.W. First Avenue, Suite 170
Portland, Oregon 97201

REPORT ON PROPOSED AMENDMENTS TO THE MARINE MAMMAL PROTECTION ACT

Pacific Marine Fisheries Commission
Technical Committee on Marine Mammals

EXECUTIVE SUMMARY

Management of certain marine mammal species and their interactions with fisheries and other marine resources are issues of concern to the Pacific Marine Fisheries Commission (PMFC). Since passage of the Marine Mammal Protection Act of 1972 (MMPA) some marine mammal populations have exhibited increases in abundance and are regularly involved in adverse interactions with fish resources and with sport and commercial fisheries. Such interactions can result in depredations on fish stocks, damage and loss of fishing gear and catch, and high rates of marine mammal mortalities. In many cases, the MMPA does not provide for the effective management of marine mammal-fishery conflicts that result in losses to fish resources, fisheries, and the mammal populations.

Current authorization for the MMPA will expire on 30 September 1988 and U.S. Congressional reauthorization hearings may be held as early as spring of 1988. The reauthorization process provides an opportunity to modify and improve the current form of the MMPA. To that end, PMFC formed a Technical Committee to examine the issue of management of marine mammals and fishery interactions, and to propose modifications that, if developed as successful amendments to the MMPA, would result in a more integrated and rational approach to the management of marine mammals, marine fishes, and fisheries.

The Committee, consisting of fisheries and wildlife scientists and managers from state resource agencies in California, Oregon, Washington, and Alaska, recognized the broad national support for the MMPA and for marine mammal conservation. The MMPA constitutes one of the most significant steps

ever taken by the U.S. Congress to recognize a valuable wildlife resource and provide for its long term conservation. While not proposing to alter this basic goal of the MMPA, the Committee recognized that certain inconsistencies and conflicts between the MMPA and other state and federal resource laws and policies often result in the inability to effectively manage for a variety of marine resource uses. In Portland, Oregon on 18-19 February and 8-9 June 1987, the Committee met to review these issues of management of marine mammals and other marine resources and to prepare this report. At the request of PMFC, the Committee received technical and scientific advice from the federal resource agencies with jurisdiction for marine mammals (National Marine Fisheries Service and U.S. Fish and Wildlife Service). A number of topics were discussed and several of these were developed as proposed amendments to the MMPA.

The Committee agreed that one of the primary objectives of the MMPA, the use of sound resource management policies to maintain healthy and stable marine ecosystems, is not currently being met in many cases involving conflicts between marine mammals and other marine resources. Achievement of this objective needs to be stressed.

The Committee felt that the MMPA fails to address the vast differences among marine mammal species, specifically with regard to their requirements for effective management and conservation, and their varied levels of interaction with other marine resources and human activities. The single management protocol of protection for all marine mammals is not consistent with sound resource management in all cases.

The Committee identified the problems of the widespread perception that all marine mammal populations are threatened or endangered when most are not; that marine mammals are in some insurmountable fashion different from all

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other animals for which successful conservation and management programs exist; and the lack of understanding of how marine mammals in some situations can have significant effects on other marine resources and fisheries.

The Committee discussed the MMPA defintion of "take", which currently includes to harass, hunt, capture, or kill a marine mammal or attempt to do such. The suggestion to omit harassment from this definition was presented to the Committee. However, the Committee concluded that unregulated harassment of wildlife was inconsistent with sound management policy and proposed no change in the current definition of "take".

The Committee proposed to amend the MMPA to provide appropriate government entitites with the authority to lethally remove nuisance marine mammals in limited situations where the conservation and protection of other significant resources are at risk. Currently the MMPA provides resource agenices with the authority to use only non-lethal measures in these cases. The Committee recognized that in certain situations the lethal removal of known destructive individual animals is the option that can best benefit the mammal population as well as other marine resources.

The concept of Optimum Sustainable Populations (OSP) was discussed and no change in the current definition of OSP was proposed. However, by providing for the flexibility to manage any species (see proposed amendment below), OSP would become the goal of management programs rather than the restriction that prevents implementation of sound management policies.

The Committee recognized that in many cases the sound conservation and management of all living marine resources can only be accomplished by providing the authority to take from marine mammal stocks as part of comprehensive management programs. With the exception of takes for scientific research, the MMPA currently allows taking only from marine mammal populations

that are shown to be within the OSP range. However, limitations of data and technical interpretations of OSP sometimes preclude OSP determinations. Also stocks of certain species may be classified as depleted (ie. below OSP) while they are large in number, and would not be harmed by carefully controlled taking of a limited nature.

The Endangered Species Act (ESA) provides for takes from threatened and endangered populations (except most marine mammals) given that, as part of a comprehensive management and monitoring program, those takes will not jeopardize the continued existence of those populations. The Committee proposed to amend the MMPA to provide marine mammals with the same system of protection as provided other wildlife populations under the ESA. This would allow conservation and management programs to be developed for any marine mammal population and would benefit all living marine resources of concern.

The Committee proposed amendment to the MMPA to provide the option for the development of cooperative marine mammal management programs by state and federal resource agencies. The federal agencies with jurisdiction for marine mammals have not developed management programs for many populations of particular concern to the coastal states. Transfer of management authority to the state agencies, as provided in the MMPA, has proven difficult to accomplish. The Committee proposed that the combined and directed efforts of the appropriate federal and state authorities may be required to successfully develop management programs for many marine mammal populations.

The Committee recognized that the fiscal resources of the federal agencies with jurisdication for marine mammals are not being sufficiently directed toward issues of concern to the coastal states, and that the current marine mammal program budgets of those agencies are inadequate to deal with all marine mammal issues. Given the lack of authority for marine mammal

management, the state agencies have not been able to secure their own funds at levels required to carry out needed research and develop management programs. As a result, the goals and objectives of the MMPA are not being met in many cases. To that end, the Committee proposed amendment to the MMPA to provide funding for state agencies to participate in cooperative state/federal programs to monitor marine mammal populations and to manage their interactions with other marine resources and human activities.

The amendments to the MMPA that have been proposed in this report are aimed at dealing primarily with marine mammal-marine fish-fishery resource problems and at providing for rational management and conservation of marine mammals and all related marine resources. The changes proposed in the report are not intended to and will not result in large scale reductions in numbers of seals, sea lions, or other marine mammal species.

On October 27, 1987 this report was reviewed at a public meeting in San Pedro, California by a panel representing the scientific and environmental communities, the fishing industry and marine resource managers. The Committee wishes to thank the panel members and public in attendance for the constructive comments, many of which have been incorporated into this final report.

BLUE WATER FISHERMEN'S ASSOCIATION

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TESTIMONY OF

Richard E. Gutting, Jr.
Blue Water Fishermen's Association

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENT
AND NATURAL RESOURCES

April 20, 1993

Mr. Chairman and members of the Subcommittee:

My name is Richard E. Gutting, Jr. and I represent the Blue Water Fishermen's Association.

Our association appreciates this opportunity to testify on the proposed program to reduce the incidental take of marine mammals by commercial fishermen.

We are concerned that the new regime proposed by the National Marine Fisheries Service is based upon a faulty understanding of commercial fisheries, and misses the real needs of both marine mammals and commercial fishermen. Unless changed by this Subcommittee we fear that this proposal would waste government and industry effort and funds, and result in the unnecessary regulation of fishermen.

The Blue Water Fishermen's Association represents the owners, operators and crews of active vessels most of which use longline gear which harvest swordfish, tuna and other pelagic species in the Atlantic, Gulf of Mexico and Caribbean as well as the many other small companies on shore who depend upon these harvests, including dealers, distributors and suppliers. Last

year, these longline fleets landed about 20 million pounds of food at fishing ports from Texas to Maine. This catch was worth more than $ 75 million at point of first sale.

Blue Water was formed four years ago but already has established several programs to help conserve the stocks of fish and marine ecosystems upon which we depend. Last year, for example, our members voluntarily tagged over 4,000 fish which were released alive, collected over 3,800 tissue samples requested by government scientists, provided numerous opportunities for government scientists and observers over and above those required to record our catch and study our vessel operations, participated in several scientific workshops and study groups, and assisted the government in various research efforts.

1. Commercial Fisheries Should Be Defined In A Consistent And Accurate Manner.

There are many different U.S. commercial fisheries and subsets within each gear type and fishing area and each has a different interaction with marine mammals. Some of these interactions are significant and some are not. Thus targeting government and industry efforts to reduce the incidental taking of marine mammals on those commercial fisheries where they will do the most good is extremely important.

To focus efforts in the right fishery there needs to be a clear and consistent definition of what is meant by a "fishery." In the past few years Blue Water has repeatedly raised concerns with the manner in which the NMFS has been distinguishing one

"fishery" from another in both its interim and proposed marine mammal programs.

The list of commercial fisheries used by NMFS in its marine mammal program clearly does not correspond to the list of fisheries used in its fishery management programs. "Fisheries" are defined under the Magnuson Act. Exactly what criteria are being used in the marine mammal programs, however, is not explained.

We also are concerned that commercial fisheries in different parts of the country appear to be defined in inconsistent ways. For example, the Atlantic Ocean fisheries described in the current interim program are much less precise than those for the Pacific Ocean. The result is that the interim program is producing misleading descriptions of the marine mammal interactions with commercial fisheries, and the relative importance of the different interactions taking place in different fisheries.

This is particularly true for the Atlantic longline vessels fishing for tuna, swordfish and sharks which are lumped together in one broad category and which have been identified as one of the top six problem fisheries for marine mammals. In fact, these longline vessels fish in several different fisheries for different fish, in different fishing areas, during different seasons, and often with different gear and methods of operations.

The yellowfin tuna fishery in the Gulf of Mexico, for example, operates primarily during the daylight hours sometimes using live-bait techniques. In the shark fisheries of the Atlantic, on the other hand, a bottom fishing rig or cable of

heavier construction is typically used and is set closer to shore early in the morning and evening.

In contrast, the pelagic vessels in the swordfish and bigeye tuna fisheries use much lighter gear than that typically used in the shark fishery, they do not set their gear on the bottom, and they fish further offshore and at night. Indeed, several of these longliners are larger long-range vessels which operate over vast ocean areas in different areas during different times of the year from the Grand Banks to as far away as South America and the Azores.

Obviously, if several fisheries are added together and treated as one "fishery," the number of mammals reported to be taken looks higher in relation to other "fisheries," particularly when these other "fisheries" are very narrowly defined.

2. **The Longline Data Needs To Be Verified.**

The interim program presently in effect calls for the collection and timely analysis of a vast amount of data regarding the interaction of fisheries with marine mammals. We are concerned that the data reported for longline vessels is inaccurate and misleading.

The reports produced by the interim program raise questions. For example, the "estimated number of longline vessels" reported this January by the exemption program (850) exceeds the number of fishery management permits issued as well as the number of vessels registered for the marine mammal program.

This suggests to us that the report does not accurately reflect the number of active vessels. Atlantic longline landings

are reported systematically to the NMFS and this fishery data base should be used to verify the accuracy of the "estimates" being used. Obtaining an accurate estimate of fishing effort is critically important because the estimates of mammal interactions often are based upon extrapolations, rather than full reports.

In this regard, the numbers of mammals reported by fishermen to be "involved" with gear interactions may also be misleading because of misunderstandings over what the word "involved" means. In addition, the animals reported for the Atlantic fleet include several mammals, such as California sea lions and Steller sea lions, which are found only in the Pacific Ocean. Finally, the numbers of mammals reported by vessels as killed or injured appear suspect because they vary by an order of magnitude between 1990 and 1991 for no apparent reason.

These reports need to be verified with a cross check of fishery data before judgments are made about the relative significance of the Atlantic longline fisheries. In this regard, the agency has substantial fishery observer data which has been gathered over the years. We are reviewing some of this fishery data along with government scientists. The preliminary results of this effort are:

1. Reports from 49 observed trips and 314 sets in the NMFS Southeast Fisheries Science Center from the second quarter of 1992 through the first quarter of 1993 show only one lethal take out of a total of six reported interactions.

2. Reports from 14 observed trips and 169 sets in the NMFS Northeast Fisheries Science Center show one lethal take and two injuries of pilot whales.

3. In the Gulf of Mexico, Louisiana State University observers reported one lethal take in 68 observed trips and 291 sets.

4. NMFS observers during 1986 through 1988 reported two mammal interactions out of 1,273 observed sets while aboard tuna longline vessels in U.S. waters.

5. Canadian observers from 1978 through 1992 reported very few marine mammals taken in more than 4,000 sets while aboard foreign tuna vessels in Canadian waters.

This information suggests that relatively few interactions are occurring. Indeed, our experience, which is confirmed by government observor data, suggests that an individual longliner might fish for several years without harming a single mammal.

We were surprised by the NMFS reports that longliners are a major problem. When we first learned of their conclusions, we immediately asked the NMFS to verify their data and asked that they cross check their mammal information with their fishery information. We also asked for an opportunity to review this information ourselves. We intend to pursue this effort.

3. **We Need To Find Solutions To Real Problems.**

Blue Water is committed to conserving the fish stocks upon which we depend. We also do not want to endanger any population of marine animal, nor cause a population to be in serious decline. Our members believe that the number of mammals physically harmed by Atlantic longline vessels each year is very small and relatively insignificant.

Fishermen try to avoid taking marine mammals because releasing entangled animals is a difficult and sometimes dangerous job. Certainly these encounters are unintended, and those that do occur appear to us to be random. Nevertheless, a careful analysis of verified data which is collected and assessed on a fishery-by-fishery basis (rather than only by gear type),

might give our members insights into whether we are incorrect, and whether there is something we can do to prevent future interactions.

Our member livelihoods depends upon their skill in "reading" ocean conditions. They follow the fish in several different fisheries and are very close observers of the marine environment. We would welcome an opportunity to share our knowledge and experience with NMFS scientists and other interested persons to find solutions to real problems.

Vast amounts of data should not continue to be gathered across-the-board by gear type and be assessed exclusively by statisticians and computers. It's not cost-effective, and may lead to erroneous conclusions. Nor should the government continue to impose permitting and reporting requirements which are not targeted on specific needs.

It is time, we believe, for the NMFS, industry and other experts to work together to identify the real problems and seek possible solutions.

ALLIANCE OF MARINE MAMMAL PARKS AND AQUARIUMS

Dedicated to Conservation through Public Display, Education and Research

STATEMENT OF
THE ALLIANCE OF MARINE MAMMAL PARKS AND AQUARIUMS
AND THE AMERICAN ASSOCIATION OF ZOOLOGICAL PARKS AND AQUARIUMS
REGARDING THE NATIONAL MARINE FISHERIES SERVICE PROPOSED REGIME
TO GOVERN INTERACTIONS BETWEEN MARINE MAMMALS
AND COMMERCIAL FISHING OPERATIONS BEFORE
THE SUBCOMMITTEE ON NATURAL RESOURCES
APRIL 20, 1993

The Alliance of Marine Mammal Parks and Aquariums ("Alliance"); an association of 25 zoos, aquariums, marine life parks and research facilities; and the American Association of Zoological Parks and Aquariums ("AAZPA"), an association of 159 zoos and aquariums; submit this written testimony on the National Marine Fisheries Service ("NMFS") Proposed Regime to Govern Interactions Between Marine Mammals and Commercial Fishing Operations ("Proposed Regime").

The 1988 Amendments to the Marine Mammal Protection Act ("MMPA" or "Act") mandated the development of a management program for marine mammal and fishery interactions. The Proposed Regime sweeps permit applications for scientific research, public display, and enhancing the survival or recovery of a species or stock into the same regulatory net with commercial fishing. The result is that under the Proposed Regime, persons applying for permits which Congress has deemed beneficial to marine mammals (scientific research, enhancing the survival or recovery of a species or stock, and public display) will be dragged into a cumbersome regulatory scheme which is likely to involve extensive administrative and judicial proceedings on a frequent basis. This will make it more difficult to get a permit for enhancing the survival or recovery of a species or stock through a non-lethal taking than it will be to incidentally kill and injure marine mammals during commercial fishing operations.

The Alliance and AAZPA recommend that public display takes be excluded from the Proposed Regime or that the MMPA be amended to provide that if it becomes necessary to allocate marine mammals through the Proposed Regime or any other mechanism, then a priority allocation be given for public display takes.

THE PROPOSED REGIME UNNECESSARILY INVOLVES PUBLIC DISPLAY IN FISHING ISSUES

The Proposed Regime establishes a mechanism for (1) calculating the Potential Biological Removal ("PBR") allowed from each marine mammal stock, (2) categorizing such stocks as Class Alpha or Class Beta stocks based on the number of animals which will be taken in a year, (3) determining which fisheries have "significant" interactions with marine mammal stocks, and (4) allocating the available PBR among all user groups. Each of these four determinations will be made anew each year, and each year they will be subject to judicial review. And the courts will not become involved until after there have been extensive rulemaking proceedings complete with the development of substantial scientific, statistical and other data. Anyone wishing to take marine mammals for any purpose will be forced to participate in this annual process, which will require the investment of significant sums of time, money and effort.

In the case of public display, the development of scientific data on stock status, participation in the administrative rulemaking process, and participation in any ensuing litigation will all occur, annually, for the taking of perhaps one or two animals per year for public display. According to NMFS data, in the three years 1990-1992, the public display industry took only four marine mammals from the wild under the MMPA.

If the issue Congress is seeking to resolve is marine mammal/fishery interactions, the public display community would like to avoid becoming embroiled in that fight, particularly when becoming embroiled in that fight will be extremely costly and time consuming.

THE PROPOSED REGIME DISCOURAGES CONTINUATION OF PUBLIC DISPLAY, SCIENTIFIC RESEARCH, AND EFFORTS TO ENHANCE THE SURVIVAL AND RECOVERY OF MARINE MAMMALS

Under the Proposed Regime, it will be easier to get a permit to take marine mammals during commercial fishing operations than to conduct scientific research to help the survival of marine mammals or to educate the public about the need to protect marine mammals and their environment.

To receive a permit for scientific research, public display, or enhancing the survival or recovery of a species or stock, the applicant is required to submit extensive information on the status of the marine mammal stock involved, justify the taking in terms of its educational value, scientific merit, etc., and explain in detail how the animal will be cared for. Permit applications are reviewed by the Marine Mammal Commission for consistency with the purposes and policies of the Act. Public hearings on the merit of the permit application can also be held.

Under the Proposed Regime, applicants for permits for scientific research, public display, and activities to enhance the survival or recovery of marine mammals have to go through this procedure, a procedure not applicable to takings by the commercial fishing industry. Then they will then be forced to get another authorization under the Proposed Regime. Having submitted data on the status of the marine mammal population involved and justified their take as consistent with the purposes and policies of the Act, applicants for permits for scientific research, public display and enhancing the survival or recovery of marine mammals will not be able to use their first permit without then participating in the PBR determinations, the allocation process for the fishing industry and the likely annual litigation.

When Congress asked NMFS to develop a program to manage marine mammal and fishery interactions, we do not believe Congress intended to interpose yet another obstacle to activities which benefit marine mammal populations directly and indirectly.

PUBLIC DISPLAY BENEFITS MARINE MAMMALS

In passing the MMPA in 1972, Congress recognized that public displays of marine mammals, visited by millions of people each year, are essential to carrying out the purposes and policies of the Act. Such displays stimulate public interest in, education about, and support for marine mammal conservation. In the Act's findings, Congress recognized the important role of public display institutions in relation to marine mammals as "resources of great international significance, esthetic and recreational as well as economic...." 16 U.S.C. 1361(6). Congress intended to foster, not inhibit, public display institutions in continuing these beneficial activities with respect to marine mammals.

Scientific research relating to marine mammals was also recognized by Congress as essential to carrying out the purposes and policies of the Act. Congress recognized "there is inadequate knowledge of the ecology and population dynamics of such marine mammals and of the factors which bear upon their ability to reproduce themselves successfully." 16 U.S.C. 1361(3).

These considerations are reflected in the Congressional deliberations on the MMPA. For example, Senator Hollings stressed that without observing marine mammals in oceanaria the "magnificent interest" in marine mammals will be lost and "none will ever see them and none will care about them and they will be extinct." Ocean Mammal Protection: Hearings Before the Subcommittee on Oceans and Atmosphere of the Senate Committee on Commerce, 92nd Cong., 2nd Sess., page 266 (1972) ("1972 Senate Hearings"). Senator Hollings continued:

> [I]f it were not for these organizations and the public exposure you have on these animals in the first place, these matters wouldn't be brought to the attention of the public.

Id. at 555.

To the same effect, Senator Gurney noted the "advent of seaquariums and oceanariums" have brought home "a much greater awareness of...ocean mammals." 118 Cong. Rec. S.25291 (Daily Ed., July 25, 1972). Stressing "the valuable educational service performed by these institutions", Senator Cranston agreed that any moratorium on the taking of marine mammals should include an exemption provision for "reputable zoos and oceanaria." 1972 Senate Hearings at 552-53. Senator Chiles stated that he gave:

> strong support towards recognizing the oceanarium exhibition industry in this legislation.... Children by the millions, either on school field trips or accompanying their parents, have become exposed to the wonders of marine mammals.

1972 Senate Hearings, at 164.

Congressman Burke noted "these aquariums do an outstanding job in providing education about the sea and its creatures to

school children and the public at large." 118 Cong. Rec. H.1910 (Daily Ed., March 9, 1972). And Congressman Pryor said "The intent of this basic legislation was not to deprive those particular institutions of bringing a proper number of animals for public use." Legislation for the Preservation and Protection of Marine Mammals: Hearings Before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, 92nd Cong., 1st Sess., page 83 (1971).

Consistent with these expressions of support, Congress has provided in the MMPA that the taking or importation for public display and scientific research are a special exception to the MMPA's moratorium. 16 U.S.C. 1371(a)(1). In 1988, Congress added enhancement of the survival or recovery of species or stock to the activities covered under Section 1371(a)(1), thus reaffirming that the items in this section are categories considered by Congress to be beneficial to marine mammals. Public Law 100-711, Section 5(c).

During consideration of the 1988 Amendments to the MMPA, Congress also specifically reaffirmed the importance of public display and scientific research. For example, the House Committee Report on the 1988 Amendments stresses that:

> Education is an important tool that can be used to teach the public that marine mammals are resources of great esthetic, recreational and economic significance, as well as an important part of the marine ecosystem.

H. Rept. No. 972, 100th Cong., 2nd Sess., pages 33-34, (1988). Similarly, the Senate Report stated:

> The effective public display of marine mammals provides an opportunity to inform the public about the great esthetic, recreational, and economic significance of marine mammals and their role in the marine ecosystem.

S. Rept. No. 592, 100th Cong., 2d Sess., page 29 (1988).

The Senate Report went on to state:

> The Secretary's determination should be guided by the fact that it is not the intent of this legislation to prohibit the display of marine mammals in zoos, aquaria, or amusement parks that comply with applicable regulations and standards. The Committee recognizes that the recreational experience is an important component of public display and that public display has served a useful educational purpose, exposing tens of millions of people to marine mammals and thereby contributing to the awareness and commitment of the general public to protection of marine mammals and their environment.

Id.

THE PUBLIC DISPLAY COMMUNITY CONTINUES TO EDUCATE THE PUBLIC AND TO FURTHER MARINE MAMMAL CONSERVATION

In 1991, over 32 million visitors observed marine mammals at Alliance facilities alone and 110 million visited AAZPA members. In the past five years, over 10 million people participated in specially designed education outreach programs developed and funded by Alliance members. Another 8-9 million will have the opportunity this year alone to benefit from a new and progressive educational satellite television series. And these numbers do not include the millions of students who participate annually in group visits organized by classroom teachers.

Visitors to Alliance and AAZPA facilities begin learning the moment they enter. Each exhibit is designed with an educational theme in mind. Habitat themes are enhanced through interpretative graphics, illustrated guide books and narrated programs, to name a few. Supplementing the general education programs available to the visiting public are numerous in-depth and specialized educational programs for pre-school and school children of all ages, college students, adults, teachers and others.

An October, 1992 Roper Poll shows the public is in near unanimous agreement (92%) that marine life parks play an important role in educating the public about marine mammals and

about environmental conservation. 86% felt that if the public learns more about marine mammals, they are more likely to become concerned about marine mammal conservation.

Much of what is known about marine mammal biology, physiology, reproduction and behavior results from scientific research conducted by Alliance and AAZPA members. In the last five years alone, Alliance members have spent over $20 million on research improving marine mammal health, diet, animal husbandry, reproductive biology and treatment for injury and disease. In the past twenty-five years, Alliance members have published over 1,600 research studies, presenting the results to professional organizations and conferences.

Comparative biology studies, which include basic and field research, undertaken by Alliance and AAZPA members are important for the conservation of marine mammal species throughout the world. Research by Alliance and AAZPA members significantly benefits wild populations of marine mammals. For example, research done at these facilities has led to the elimination of toxic fuel oils being used in offshore oil drilling, testing satellite linked radio transmitters to allow scientists to learn more about marine mammal migration patterns, identifying marine mammal diseases, developing treatment methods to assist stranded marine mammals, studying the effects of aircraft noise on birds and marine mammals, researching how harbor seals avoid heart disease (the number one killer of adults) even though their all seafood diet is high in protein and fatty acids, and video taping marine mammal behavior in the wild to acquire information to protect these animals in their natural environment.

An October 1992 Roper Poll showed that 86% of the American public considered it essential or important for zoos, aquariums, oceanariums and marine life parks to do research.

Because of their extensive expertise with marine mammals, Alliance and AAZPA members are called upon by the public, local animal organizations, and state and federal regulators to respond to animals in distress through strandings and injury. Almost 1,500 sick and injured wild animals have been rescued, rehabilitated and returned to the wild by the marine mammal community in the past five years. Years of research and study are responsible for this success. Since 1987, Alliance members alone have spent over $5 million rescuing, treating, feeding and releasing marine mammals. According to an October 1992 Roper

Poll, nearly nine in ten Americans feel that medically treating injured animals and returning them to the wild is very important, and are supportive of Alliance and AAZPA members in these efforts.

In 1972, Congress recognized the contributions made by the public display community in educating the public about marine mammals and about the need to conserve these animals and their environment. Congress also recognized the scientific research accomplishments of the public display community. Twenty-one years later, public display facilities have amassed an even more impressive record of accomplishment.

CHANGES ARE NEEDED TO THE PROPOSED REGIME

In considering differences in the number of takings for public display (four in the last three years), the accomplishments of the public display community in educating the public to conducting important research, and the takings incidental to commercial fishing operations which often result in the death and serious injury of marine mammals. We believe that the small number of takings for public display should be excluded from the new and cumbersome regulatory program for commercial fishing. If public display takings are to be included, public display takes should be given a priority.

TESTIMONY OF DINA STANSBURY
EXECUTIVE DIRECTOR
FRIENDS OF THE SEA OTTER

submitted to the

SUBCOMMITTEE ON ENVIRONMENT AND
NATURAL RESOURCES

COMMITTEE ON MERCHANT MARINE AND FISHERIES

UNITED STATES HOUSE OF REPRESENTATIVES

on the
Reauthorization of the
Marine Mammal Protection Act Hearings

April 20, 1993

Friends of the Sea Otter ("FSO") appreciates this opportunity to provide testimony on the reauthorization of the Marine Mammal Protection Act ("MMPA").

FSO is a non-profit conservation organization that was formed in 1968 to protect the Southern sea otter and its marine habitat. To the degree determined by the relationship to the Southern sea otter population, FSO also occasionally becomes involved in issues related to Alaska and Russia sea otter population biology and management. Over 4,700 members in 50 states and 20 foreign countries support FSO's efforts.

In 1977, FSO was instrumental in having the Southern sea otter listed as "threatened" under the Endangered Species Act ("ESA"). Since then, FSO has testified in Washington, D.C. during ESA and MMPA reauthorization hearings. FSO also played an active role in achieving state legislation that restricted the use of gill nets in nearshore waters along central California significantly reducing incidental take in fishing operations. These restrictions have been one of conservation's greatest success stories -- a precipitous decline in the status of a threatened population was dramatically reversed through cooperative efforts, and the fragile Southern sea otter population is now undergoing modest growth.

Since 1984, FSO has participated in a Southern sea otter recovery process that resulted in the translocation of 139 sea otters to San Nicolas Island through the years 1987 to 1990. Intended to provide a "reserve" colony of sea otters to be drawn from after a major oil spill, the uncertain success of the San Nicolas translocation program has instead shown us that we need expanded recovery efforts. Based on the slow growth of translocated sea otter populations, and the devastation that results from an oil spill the size of the Exxon Valdez spill in 1989, we now know that the establishment of small isolated groups of Southern sea otters will not ensure their future.

Sea otters have a profound effect in the structuring and health of the nearshore ecosystem. Many scientists have attributed to otters the role of a "keystone" species, i.e., one that shapes and drives the underlying food pyramid. Sea otters occur largely in the nearshore environment (within one mile of shore), generally foraging in waters 120 feet or shallower, and conducting all other activities at or near the water's surface. They are highly visible to people. Their engaging appearance and behavior drive a tourist industry; their high visibility makes them prime subjects for shore-based behavioral research and population studies; their consumption of shellfish puts them in direct competition with commercial shellfish enterprises; and their susceptibility to

oil puts them at odds with oil exploration and transport. Through the years of the sea otter hunt, otters were driven toward extinction for their valuable fur. Through the recent years of recovery, sea otters have faced the risks of human competition for food, the chronic effects of water pollution, incidental take in fisheries, and the potential for oil spills caused by oil transport or development. It is clear that the Southern sea otter is a central player in issues of both a regional and global nature, and it is a litmus species for how well we are governing human interactions with the marine environment.

Since its enactment in 1972, the MMPA has been one of the sea otter's most important protections. The requirements of the MMPA played a major role in the State of California's effort to protect the otter from staggering losses in the nearshore set gill and trammel net fishery. As the California Department of Fish and Game has stated, these losses "could be the most significant mortality factor contributing to the apparent lack of sea otter population growth in California waters during the past decade."

The MMPA also has been an important force in reintroducing the Southern sea otter to San Nicolas Island, promoting an observer program for incidental take, and conducting valuable scientific research. To continue this progress, we need a strongly reauthorized MMPA.

Our testimony today is limited to the issue of incidental take of sea otters in commercial fishing operations in California and Alaska. We will submit testimony on other MMPA issues in the future.

Any incidental take of Southern sea otters could jeopardize species recovery. Even low levels of take could lead into a period of population stasis or decline similar to that of the mid-1970's to the mid-1980's.

Before the current net bans were enacted by the California legislature, sea otters were drowning in large numbers (with take exceeding annual growth of the population through reproduction) in large mesh entangling fishing nets set primarily for halibut. While the gill net restrictions have reduced the number of otter drownings, they have not stopped them. In addition, there is one 20 mile area along the Central California Coast with no gill net restrictions, where commercial net fishing occurs and a small colony of sea otters is now present on a year-round basis. The potential for incidental take remains a threat in this area, as does take in illegal nets in closed areas.

Protecting Southern sea otters from incidental take also is a key aspect of the ESA and MMPA recovery efforts. For example, in establishing the legal basis for translocating sea otters to San Nicolas Island, Public Law No. 99-625 also

established an area around the translocation site and throughout the parent population range (including room for natural expansion) where sea otters would be fully protected and incidental take prohibited. The concept of an absolute prohibition of incidental take in these areas was an essential underpinning of Public Law No. 99-625. (Public Law No. 99-625 also designated areas where otters would not be allowed to colonize, where incidental take during legal fishing operations would not be prohibited, and where specified protections of the ESA would not apply.)

The State of California joined in the effort by prohibiting fishing nets and the discharge of firearms around the San Nicolas Island translocation site. As a result, sea otters are fully protected north of Point Conception and around their reoccupied habitat at San Nicolas Island.

By honoring in the 1988 interim exemption from the MMPA incidental take prohibition the understanding that there would be no incidental take of Southern sea otters in its entire range except the designated area south of Point Conception, Congress expressly reaffirmed the importance of prohibiting the incidental take of Southern sea otters. That protection remains as necessary today as it was in 1988. In addition, the incidental take of sea otters in Alaska is becoming an issue of major concern which has been overlooked by the

federal government. Such takes have never been authorized under the MMPA, although they are occurring in large numbers.

In accordance with the requirements of section 114 of the MMPA and the terms of the 1988 interim incidental take authorization, the National Marine Fisheries Service ("NMFS") has submitted a proposed regime to govern the incidental take of marine mammals in commercial fishing operations. FSO participated in this review, including the Marine Mammal Commission's ("MMC") preliminary effort of providing guidelines to NMFS. Throughout the public review of the proposed regime, FSO has argued strenuously for complete protection of southern sea otters from incidental take in accordance with the Congressional mandate in Public Law No. 99-625. The U.S. Fish and Wildlife Service ("FWS") has agreed that no new incidental take authorizations should be established for this species, see Exhibits 1 and 2, and has provided these views to NMFS. Of course, NMFS must defer to FWS on its recommendations for this species.

With respect to the MMPA incidental take program that will result from these hearings, FSO believes that several guiding principles must be followed:

1. No incidental take of Southern sea otters should be authorized inconsistent with existing law;

2. The current purposes and policies of the MMPA must remain in place, including the zero mortality goal;

3. A permit system based on the current mechanisms in the MMPA must be used to authorize incidental take and drive MMPA recovery efforts for sea otters in Alaska and other marine mammals;

4. A conservative bias must be exercised in favor of Alaskan sea otters and other marine mammals;

5. The burden of proof for obtaining authorization for incidental take must be placed on the fishing industry;

6. Efforts should be made to work with the fishing industry to develop fishing techniques and gear that will reduce incidental without undue burdens on the industry; and

7. Finally, adequate observation, verification and reporting of incidental takes are essential. There is no excuse for anything less than full and accurate reporting and cooperation with verification efforts by all those involved in incidental take.

FSO is now participating in the negotiations between the environmental community and the fishing industry over the development of an appropriate program to govern incidental take of marine mammals. In keeping with the commitment made by the participants in that effort, we are withholding

specific recommendations until those negotiations are completed. FSO's position in these negotiations is guided by the general principles set forth in this testimony and our previous submissions to the federal agencies during the section 114 public review procedures.

For many years, sea otters in California and Alaska have been seriously affected by incidental take. FSO hopes that the lessons learned as a result of the sea otter's experience will find application in the effort to protect other marine mammals.

Thank you for considering our views. FSO supports a strong MMPA. We look forward to working with this Subcommittee during the 1993 reauthorization, and in the future, to advance the MMPA's purposes and policies.

In Reply Refer To:
FWS/FWE/DES

Dr. William W. Fox, Jr.
Assistant Administrator for Fisheries
National Marine Fisheries Service
1335 East-West Highway, Room 9334
Silver Spring, Maryland 20910

MAR 24 1992

Dear Bill:

The Department of the Interior recently provided comments to Dr. Charles Karnella on the National Marine Fisheries Service's (NMFS) revised draft of the Proposed Regime to Govern Incidental Taking of Marine Mammals in Commercial Fishing Operations (copy enclosed). However, I felt it might be useful if I wrote to you directly about concerns the Fish and Wildlife Service (Service) has with the proposal as it relates to southern sea otters and West Indian manatees, both of which are protected under the Endangered Species Act (ESA). If implemented, we are concerned that the regime proposed by NMFS will undermine hard won conservation measures already established for these species.

The decline of the California sea otter population from the mid-1970's to mid-1980's has been largely attributed to accidental drownings in fishing nets. It was only after the 1990 California closure of gill and trammel net fishing within the 30 fathom contour that most if not all incidental take was eliminated within the sea otter range, effectively achieving the zero mortality goal of the Marine Mammal Protection Act (MMPA) and the draft revised recovery plan. Congress acknowledged the adverse impact of commercial fisheries on southern sea otter populations when it expressly excluded them from the 5-year commercial fishery exemption granted in the 1988 amendments to the MMPA. I suggest that this establishes a precedent for excluding from the proposed regime endangered and threatened species known to be highly vulnerable to incidental take by commercial fisheries.

Further, in 1986, Congress passed Public Law 99-625 authorizing the establishment of an experimental population of southern sea otters. This special legislation, which is independent of the MMPA and ESA, includes zonal management whereby incidental take is prohibited in the translocation area around San Nicolas Island. Outside this area in the "management zone," intentional take is prohibited, but incidental take, such as by commercial fisheries, is not a violation of the ESA. We believe the proposed regime, were it applicable to southern sea otters, would possibly conflict with the translocation law.

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The U.S. population of the West Indian manatee is classified as a separate subspecies and numbers approximately 1,465 individuals. Most remaining populations outside of Florida are thought to be small and declining in size due to poaching, incidental take in nets, habitat degradation, and other threats. Thus, the species' long term survival may depend on the success of efforts to protect it in the southeastern United States.

In 1990, 216 dead manatees were salvaged in the southeastern U.S.; in 1991, 181 were salvaged. Nearly one-third of these deaths were human-related, most due to motorboat collisions but some were the result of tangling in nets or in trap lines. Considering its low reproductive rate, it is not likely the species can sustain this level of mortality and continue to survive. The Service has taken the position in our Section 7 biological opinions under the ESA, that the incidental take of one manatee would present a jeopardy situation. Therefore, we believe that any analytical system that purports to designate any level of incidental take for the manatee would be in violation of that section of the ESA. Both the Revised Manatee Recovery Plan and the draft revision of the Southern Sea Otter Recovery Plan identify recovery tasks which specifically address the need to reduce the incidental take to levels approaching zero.

Another concern expressed in the Department's January 28 letter is the failure of the document to acknowledge the Service's management responsibility for the species under our jurisdiction, including our recovery responsibility under the ESA. Despite our noting this in our comments on the original draft, the omission persisted in the revised version. Furthermore, the revised draft includes revised formulae which translate into even higher Potential Biological Removal (PBR) levels than those in the original draft. For manatees the PBR increased from 2 to 14; for southern sea otters the PBR increased from 9 to 58. These levels would exceed the jeopardy level for these species and therefore heighten my concern for the future of these species under the proposed regime.

The Service is opposed to any sanctioning or perceived sanctioning of incidental take of these species by commercial fishing activities. Although we prefer exclusion of endangered and threatened species under Service jurisdiction from the proposed regime, we would be willing to discuss alternatives that effectively accomplish the same result, to the extent they were not precluded by special legislation such as the sea otter translocation law.

I hope this helps to illustrate and emphasize our position regarding exclusion of these species from NMFS's incidental take proposal. I would be very happy to discuss this further if you wish.

Sincerely,

RICHARD N. SMITH

DIRECTOR

Enclosure

United States Department of the Interior

FISH AND WILDLIFE SERVICE
WASHINGTON, D.C. 20240

ADDRESS ONLY THE DIRECTOR,
FISH AND WILDLIFE SERVICE

In Reply Refer To:
FWS/DLS/91-5096

Dr. Gregory K. Silber
Scientific and Executive Director
Friends of the Sea Otter
Post Office Box 221220
Carmel, California 93922

DEC 2 1991

Dear Dr. Silber:

Thank you for your October 9 letter requesting that the Fish and Wildlife Service take special, expedited measures to participate in the review being conducted by the National Marine Fisheries Service (NMFS) to develop recommendations to Congress regarding incidental taking of marine mammals by commercial fisheries.

The Fish and Wildlife Service (Service) has been informed by NMFS staff that an interim document soon will be distributed to numerous interested parties, including Friends of the Sea Otter. The document is intended to clarify misconceptions and other aspects of the Draft Legislative Environmental Impact Statement (DLEIS) and proposed regime. I understand that comments will be accepted. Service biologists have participated with NMFS on a task force to develop the DLEIS. The Service will continue meeting with NMFS to ensure that the proposed regime does not compromise the Service's position that no incidental taking should be allowed for California sea otters and manatees.

I appreciate your efforts and support throughout this program review. If I can be of any further assistance, please let me know.

Sincerely,

Signature
acting DIRECTOR

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